S. HRG. 98-35

REAUTHORIZATION OF THE OFFICE OF GOVERNMENT ETHICS

HEARING

BEFORE THE

SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

S. 461

TO EXTEND THE AUTHORIZATION OF APPROPRIATIONS FOR THE OFFICE OF GOVERNMENT ETHICS FOR FIVE YEARS

FEBRUARY 24, 1983

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REAUTHORIZATION OF THE OFFICE OF GOVERNMENT ETHICS

THURSDAY, FEBRUARY 24, 1983

U.S. SENATE,
SUBCOMMITTEE ON OVERSIGHT
OF GOVERNMENT MANAGEMENT,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, D.C.

The subcommittee met at 9:31 a.m., in room SD-562, Dirksen Senate Office Building; Hon. William S. Cohen (chairman of the subcommittee), presiding.

Present: Senators Cohen, Rudman, and Levin.

Staff present: Susan M. Collins, staff director; Mary Berry Gerwin, counsel; Frances C. de Vergie, chief clerk; Rachel D. Harlan, assistant chief clerk; Linda J. Gustitus, minority staff director; Ed Abrahams, minority staff investigator.

OPENING STATEMENT OF SENATOR COHEN

Senator COHEN. The subcommittee will come to order.

Today the Subcommittee on Oversight of Government Management is holding a hearing on S. 461, a bill to reauthorize the Office of Government Ethics for 5 years.

In passing the Ethics in Government Act of 1978, the Congress recognized the need for a central office to oversee the conduct of officials and employees of the executive branch. At that time, the Congress and the General Accounting Office concluded that the ethics programs in the Federal Government were in total disarray: They were ineffectively managed, inadequately staffed, and characterized by inconsistent and incoherent regulations. In short, ethics training, monitoring, and enforcement were not receiving high priority by Federal agencies.

The Congress established the OGE to remedy these problems. In doing so, Congress signaled its commitment to a strong system of ethical standards to insure that public officials are free from conflicts of interest. Effective ethical standards help to promote public confidence in Government officials and, in turn, to increase public confidence in the Government itself.

The Office of Government Ethics has been given important responsibilities under the Ethics Act. These include devising procedures to implement the financial disclosure system for the executive branch and providing advice and guidance to agencies and officials on how to comply with standards of conduct.

It also was given the authority to monitor and evaluate the ethics programs of individual agencies and to order agencies and officials to take steps to comply with ethical requirements. Equally important, the OGE was given responsibility to recommend improvements in the overall system of Government ethics.

Today, the subcommittee will evaluate how well the OGE has performed these functions. We will hear how the OGE has improved the caliber of Government ethics through its educational, regulatory, advisory, and enforcement roles. We will also explore whether the need for a central Office of Government Ethics still exists and whether any structural changes should be made to improve its effectiveness.

In its oversight capacity, the subcommittee will also discuss the effects of other parts of the Ethics Act on executive branch officials. Critics have challenged that the act's financial disclosure requirements and post-Government employment restrictions have discouraged qualified persons from entering Government service and have inhibited presidential recruiting.

Others have argued that the Ethics Act has simply become a "scapegoat" and is being blamed for a variety of other disincentives to public service, such as pay levels, public limelight, and other conflict-of-interest laws.

Today, our witnesses will give us insight on the performance of the OGE and on these other issues. We will hear testimony from David Scott, the Acting Director of the OGE, J. Jackson Walter, former Director of the Office and now the President of the National Academy of Public Administration, and Ann McBride of Common Cause.

I look forward to addressing these issues and to hearing from our witnesses.

Senator Rudman, do you have an opening statement?

Senator RUDMAN. I do not have an opening statement Mr. Chairman. But I do have a few questions, and unfortunately I have to be at a defense hearing at 10, so Mr. Chairman, if you might permit me to ask a few questions immediately following Mr. Scott's statement I would appreciate it.

Senator LEVIN. I do have an opening statement. I would be happy to withhold it if it would help Senator Rudman.

Senator RUDMAN. Thank you, Senator Levin, it would help.

Senator COHEN. Mr. Scott.

TESTIMONY OF DAVID R. SCOTT, ACTING DIRECTOR, OFFICE OF GOVERNMENT ETHICS, ACCOMPANIED BY JACK COVALESKI, MONITORING AND COMPLIANCE DIVISION; AND GARY DAVIS, SENIOR STAFF ATTORNEY

Mr. SCOTT. Good morning. Joining me are Jack Covaleski, the head of our Monitoring and Compliance Division, on my right, and Mr. Gary Davis, a senior staff attorney, on my left. They are here to help me answer any questions you may have.

I appreciate your invitation to appear before this subcommittee to present the views of the Office of Government Ethics (OGE) on S. 461, legislation to extend the appropriations authority of this

Office for a period of 5 years beyond its present expiration date of September 30, 1983.

In response to your request, I have prepared and submitted a written statement for the record. In order to permit time for any questions you may have, I will summarize that statement here today.

Title IV of the Ethics in Government Act of 1978 established the Office of Government Ethics to provide overall direction of executive branch policies related to preventing conflicts of interest. In particular, the work of the Office involves executive branch personnel financial disclosure requirements; "revolving door" or post-employment conflicts of interest; all other criminal conflict-of-interest statutes; and executive branch employee responsibilities and standards of conduct.

The act gave OGE an important role in the Presidential appointment process. In regard to every Presidential nominee requiring Senate confirmation, the Director of OGE must sign the nominee's public financial disclosure report and deliver it to the chairman of the Senate committee of confirmation, together with an opinion letter affirming the nominee's compliance with all applicable conflict-of-interest laws and regulations. The recent practice of the Senate committees is to regard receipt of the OGE opinion letter as a condition precedent to completion of a confirmation hearing.

The responsibilities of OGE are divided between the Chief Counsel and his staff of five attorneys, and the Deputy Director who oversees the Monitoring and Compliance Division staff of nine management analysts. Including support staff, OGE has a current authorized strength of of 23.5 positions and is operating presently with a staff of 21 persons.

The legal staff develops regulations and policies concerning various executive branch ethics matters; renders advisory opinions on all kinds of ethics issues; and responds to approximately 380 telephone inquiries per month, many of which are from the White House Counsel's Office or from private companies or firms.

The attorneys review the public financial disclosure reports of Presidential nominees prior to their Senate confirmation hearings and consult with the appointees and/or the agency ethics officials as necessary to bring the appointees' financial interests into compliance with applicable Federal conflict-of-interest laws and regulations.

The Monitoring and Compliance staff of OGE conducts reviews of the adequacy and effectiveness of Federal agency ethics programs, including the public and confidential financial disclosure systems, standards of conduct regulations, and ethics training and counseling programs.

The compliance staff conducts training programs for agency ethics officials, employees, and other interested groups and has recently initiated a training program for regional ethics officials to be given in all 10 standard Federal regions.

The compliance staff also reviews the annual and termination reports of approximately 900 Presidential appointees each year, and works closely with agency ethics officials to insure that such reports are accurate and complete.

It is important to note one function that was not given to the Office of Government Ethics by the Ethics in Government Act. The Office was given neither the mandate nor the manpower to staff its own investigations of conflict-of-interest or standard-of-conduct allegations in the executive branch.

Rather, the act's legislative history shows the Office of Government Ethics' role is to direct a decentralized system of ethics advice and enforcement where agency personnel—usually either the designated agency ethics official or the Inspector General's staff—would conduct investigations which were deemed necessary either by that agency or by the Office of Government Ethics and would make any necessary referrals to the Department of Justice.

In the wake of the 1980 election, with the advent of a change in administrations, OGE was faced with the first Presidential transition under the act. The test of the Office was whether it could review and process the public financial disclosure reports of Presidential nominees and render opinions to the Senate confirmation committees at the pace set by the White House nomination process.

Following the election, OGE immediately developed lines of communication with the Presidential transition team and, subsequently, the White House Personnel Office and the Counsel to the President. Key staff members of each Senate confirmation committee were contacted to discuss operating procedures, and almost daily contacts were maintained throughout the 1981 transition year.

An OGE attorney was assigned to work with the transition team to smooth the process and to assist in any and all matters concerning the act. A computer system was developed for OGE to keep track of the financial disclosure reports from approximately 800 appointees throughout the confirmation process and to be able to give a daily status report to the White House.

A procedure was devised whereby the President-elect's notice of "intent to nominate" was treated as tantamount to nomination for executive branch review purposes, and receipt of an intended candidate's financial report was deemed to be receipt of a form for purposes of public disclosure.

The procedures improvised by OGE worked well, although much of what was done was without any statutory guidelines. I would suggest that the Office of Government Ethics' handling of the 1981 transition is a good example of administrative solutions being created to fill statutory voids.

Despite initial fears and media reports that the Ethics in Government Act of 1978 would be a bottleneck in staffing the new administration, this did not occur. Since 1981, over 1,000 Presidential appointees have come into the executive branch of Government with almost every conceivable type of financial interest. Agreements reached with appointees to protect them and the Government against conflicts of interest have withstood the scrutiny of the Senate, the White House, public interest groups, the GAO, and the news media.

We believe that the Office fully met the test provided by the transition in a highly professional and timely manner. The protections set in place for the nominee, the public, and the Government heightened the sense of integrity and openness in the Federal Government.

Title IV of the Ethics Act established OGE as a statutory agency in the Office of Personnel Management. Section 402(a) specifies that OGE shall operate "under the general supervision" of OPM.

In general, this broad directive of section 402(a) of the act has been carried out by OGE acting independently of OPM in its dealings with other Federal agencies on issues involving substantive conflicts of interest and standards of conduct.

On the other hand, OPM has at all times exercised administrative control over the budgetary, personnel, and logistical operations of OGE. OGE has an "advice and consent" Presidential appointee to carry out its statutorily defined programs and responsibilities. Consequently, OPM has seen its major role vis-a-vis OGE to be that of providing it with adequate support from OPM's administrative offices.

The budget and staff levels for OGE for fiscal years 1980 through 1983 are set forth in my written statement, and I will not repeat them here.

Our fiscal year 1983 budget level is $1,016,000. Our fiscal year 1982 budget level was $951,300.

OGE does not have its own separate budget, but rather receives its funds from OPM's appropriated funds. On the whole, OGE has received what it needs from OPM in terms of budget and staff, but only as a result of special pleas and agreements.

Both Director Donald Devine and Deputy Director Loretta Cornelius have been supportive of OGE and its mission. They have been responsive to direct appeals from the Office for necessary funds and additional staff, and thus far the Office has received adequate resources.

As a part of OPM, OGE is subject to its management policy decisions. This can have a massive, unintended effect on our small office.

For example, when President Reagan directed a personnel freeze upon taking office in 1981, OGE was swept into it because it was treated like any other OPM entity. Had OGE been considered a separate agency for hiring purposes, it would have escaped an unnecessary hardship, because the freeze directive itself exempted agencies with less than 100 employees.

Similarly, when OPM reduced its budget in 1982 by means of reductions in force (RIF's), OGE first had to argue to OPM that riffing its tiny staff would be disastrous to its mission and was budgetarily unnecessary. Having been successful in that argument, OGE still had to absorb the resultant bumps from other personnel in OPM who were riffed, and thereby OGE suffered dislocating personnel losses anyway.

Because of OGE's small staff and budget, a small ripple in OPM's budget and staffing plans becomes a tidal wave when it impacts on OGE. Accordingly, administrative changes are planned which would give OGE a separate line item within OPM's budget. This would insure congressionally mandated review and funding for OGE, separating the Office from fluctuations in OPM's budget process.

The Ethics in Government Act requires the Director of OGE to review the financial reports of executive branch appointees and to report his opinion on their conflicts, if any, to the Senate commit-

tee considering the nomination. The Director must be responsive to both the President and the Senate and yet keep his independence from both. To be effective, the Director must make difficult, delicate decisions in an independent, apolitical manner. He should have the confidence of the President but should also feel free to act apart from the President's wishes.

In spite of these potential tensions, OGE has functioned effectively and without political interference in both Republican and Democratic administrations under the existing appointment system. There is no compelling reason to change the terms of appointment and removal of the Director.

We support the 5-year extension of authorization provided for in S. 461. The need for a centralized Government ethics office has long been recognized. A 1960 report of the Association of the Bar of the City of New York recommended the establishment of such an office, noting that the administrative process could provide a viable alternative to "the broad ax of criminal prohibition" and could, in addition, reduce the risks the conflict-of-interest laws were intended to meet.

In the years thereafter, various bills to create an ethics office were introduced. The GAO recommended the creation of such an office in a 1977 report.

In remarks made at OGE's 1982 annual conference, Roswell Perkins, a major author of the 1960 New York Bar study, deemed the creation of the Office of Government Ethics "by far the most important and positive accomplishment of the 1978 act," in view of the fact that "it took nearly two decades * * * to get the job done, after strong and clear recommendations had been made to that effect."

The 5-year reauthorization will provide the appropriate means to review the activities of OGE while maintaining sufficient independence for effective performance of Office functions.

In your letter inviting me to testify here today, Mr. Chairman, you asked that I include in my testimony any recommendations I might have for amending the financial disclosure and post-employment provisions of the Ethics in Government Act. I will not discuss in detail any of my proposals, but rather will briefly mention a few areas where improvements are needed.

These proposals are not intended to be all-inclusive, but rather are aimed at those portions of the law which I believe are most in need of attention.

First, I propose that the act be amended simply to eliminate public disclosure by employees in the career civil and career military services. Requiring careerists to file confidential rather than public statements retains the simplicity of existing law, but reaches a better balance between the privacy interests of Government employees and the public's interest in preventing conflicts of interest.

Another area of the act in which a number of problems have arisen is the portion dealing with blind trusts. The rules need to be clarified and simplified. Qualified diversified trusts should be available to all executive branch employees; provision should be made for so-called "old family trusts"; and the act's concept of "excepted trust" should be clarified.

The law governing post-employment conflicts of interest has long been a subject of much debate. Section 207(g), which has nothing actually to do with post-employment per se, but rather deals with the activities of partners of present day Government employees, needs to be clarified.

I would also recommend that Congress abolish designation of senior employees and separate non-statutory components. Experience has shown that the designation process is both unnecessary and unworkable.

In summary, Mr. Chairman, the Office of Government Ethics has gotten off to a good start in its first 4 years of existence. While some executive branch conflict-of-interest problems regrettably still exist and still make news, far more have been prevented and never have become headaches or headlines because of the existence of the Office of Government Ethics.

I therefore want to express my support for legislation reauthorizing the Office of Government Ethics, an office which has successfully fulfilled its important obligation to provide overall direction of executive branch policies regarding conflicts of interest.

I will be happy to answer any questions you may have.

Senator COHEN. Thank you very much, Mr. Scott. Senator Rudman?

Senator RUDMAN. Mr. Scott, it is my understanding that it would not be in anyone's best interest to discuss in any detail the substance of anything you presently are doing, but I think we can probably with some very carefully phrased and constructed questions, which I am sure you are capable of delivering.

First, it is my understanding that you are currently Acting Director of the Office of Governmental Ethics; is that correct?

Mr. SCOTT. That is correct, Senator Rudman.

Senator RUDMAN. Is it also true that you are not a candidate for the permanent position?

Mr. SCOTT. That is correct, Senator. I made that expressly clear to the White House.

Senator RUDMAN. You are a career employee?

Mr. SCOTT. That is correct. I am an SES career employee.

Senator RUDMAN. How long have you been acting in this post, Mr. Scott?

Mr. SCOTT. Since last September.

Senator RUDMAN. It has been about 6 months since the position became vacant.

Mr. SCOTT. That's correct.

Senator RUDMAN. To your knowledge, is there anyone being considered for the permanent position?

Mr. SCOTT. I have been told that there is.

Senator RUDMAN. I have just a series of questions because there is an issue that has bee.. getting a fair amount of press, and I am just curious about its current status.

It is my understanding that you are currently considering whether or not the details of a contract involving a book written by Mr. Deaver of the White House, violates any conflict-of-interest laws or regulations. Are you currently involved in such an investigation and if so, are you in the process of preparing to deliver a legal opinion?

Mr. SCOTT. Yes, Senator Rudman. We would call it an inquiry. An investigation is, as I think I indicated briefly in my statement, something for which we do not have a mandate—we don't have investigators, but we do conduct inquiries.

Senator RUDMAN. I think that word is too loosely used in this city anyway. Anybody who looks into anything is accused of conducting an investigation. Currently on the other side of the hill we have about 12 investigations going on simultaneously all concerned with the same issue, but be that as it may, you do have an inquiry going on?

Mr. SCOTT. Yes, sir.

Senator RUDMAN. Do you expect to issue a public written report on your decision in this case?

Mr. SCOTT. We expect to issue a public statement, yes, sir.

Senator RUDMAN. And when would you expect that review to be completed, roughly?

Mr. SCOTT. We do have some factual matters that we have to untangle before we can do it, but we expect that to be done in the next several weeks.[1]

Senator RUDMAN. Now making the assumption that you found by your own regulations, rules and precedents that there was a conflict of interest, in this or any case, what action would you take?

Mr. SCOTT. In any case?

Senator RUDMAN. In this case or any other case, if you find that there is in fact a clear conflict, what do you do?

Mr. SCOTT. Senator, it depends really in that regard what the violation is. The Ethics in Government Act, of course, calls for certain remedies. For example, if somebody does not file a public disclosure statement, certain sanctions are right in the act, you refer that to the Department of Justice for possible civil action. For standards of conduct violations, there are certain alternatives for people who are not political appointees--adverse actions by the agencies are the classic example.

In regard to someone who is in a political appointee position, the normal sanction would be to bring it to the attention of either the President or the ethics official at that agency.

Senator RUDMAN. Now, it is also my understanding that under current practice you do not routinely review all of the financial disclosure statements filed by White House aides because they are not confirmed by the Senate; is that correct?

Mr. SCOTT. That is correct.

Senator RUDMAN. Do you believe that ought to be changed? Would that be something you think ought to be amended due to the sensitivity of those positions? Do you believe people who are at a certain level in the White House ought to have their disclosures reviewed by you in addition to those whom we confirm here?

Mr. SCOTT. I think that is a good suggestion. I would answer it this way: We already have a policy every year of reviewing the statements of White House appointees who are not confirmed and therefore do not regularly come through our office, but if it was in-

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[1] Mr. Scott issued a public statement outlining the findings of the OGE in this matter on Mar. 25, 1983.

stitutionalized in the law, I would think that that would be a good idea.

Senator RUDMAN. This tends to be a general legal question, and having administered similar laws in my prior work before coming here, I assume you must have a series of precedents that are contained within your office that you rely on to make decisions in particular cases.

Mr. SCOTT. Yes, Senator. In fact since we are a new office we have our own precedents, but we also rely heavily on the Department of Justice precedents from the Office of Legal Counsel.

Senator RUDMAN. And in this whole area of what people do after they leave Government, or particularly in the area of deferred compensation and so forth, do you have a precedent currently in your office, or are you aware of one within the Department of Justice that specifically deals with the theory of constructive receipt?

Mr. SCOTT. Constructive receipt in what sense?

Senator RUDMAN. Of funds.

Mr. SCOTT. In the book-royalty sense?

Senator RUDMAN. In any sense. I'm trying to be somewhat circumspect because you currently have a case under inquiry. But, obviously when you and I make an agreement to do something, the question of constructive receipt depends on when the obligation arises under the common law and under most statutes. I'm just wondering whether you have that kind of a precedent.

Mr. SCOTT. We do have some precedent, Senator, but I am sure, as your question suggests, every time we get a question we see that our precedent is not always on all fours with it. We do have some.

Senator RUDMAN. You do have a precedent in the area of constructive receipt, which is a fairly set doctrine in the law. Most precedents on constructive receipt are generally similar in most jurisdictions. I know they are in each of the circuits of the Federal systems.

Mr. SCOTT. The way it comes up most with us is the question of honoraria where executive branch people are not allowed in some instances to accept honoraria for speeches, and let's say they will say "I will not accept it myself but I will designate it to my favorite charity."

That is a constructive receipt problem that comes up a lot.

Senator RUDMAN. Do you have precedents on deferred compensation within your regulations?

Mr. SCOTT. I can think of one guideline precedent that we have written on that.

Senator RUDMAN. I have a number of additional questions in mind, Mr. Chairman, but I know that the chairman can follow up. We have the Secretary of the Army and the Chief of Staff of the Army in a very important hearing at 10 o'clock which I have to attend.

I understand, Mr. Scott, you have been doing an exemplary job in your present acting position. I think it is probably regrettable but understandable that you do not want the position permanently. [Laughter.]

I thank you very much for your testimony this morning, and I'm sorry I have to leave.

Mr. SCOTT. Thank you, Senator Rudman.

Senator COHEN. Senator Levin, why don't you make your opening statement at this point and then I can follow up with questions?

Senator LEVIN. Thank you, Mr. Chairman.

I was hoping Senator Rudman would tell us why it is understandable that we could use our imagination—I just have a brief opening statement, Mr. Chairman, and then I guess we will come back later for my questions.

OPENING STATEMENT OF SENATOR LEVIN

Senator LEVIN. The preamble to Executive Order 11222, which prescribes standards of conduct for Government employees, reads in part as follows:

> Where Government is based on the consent of the governed every citizen is entitled to have complete confidence in the integrity of his government. Each individual officer, employee or adviser of government must help to earn and must honor that trust by his own integrity and conduct in all official actions.

That goal has not always been adhered to, either before or after 1965 when the Executive order was signed. Following Watergate and the Controller General's conclusion in 1976 that the Executive order was not strong enough to maintain "confidence in the integrity of government," Congress passed the Ethics in Government Act in 1978 which, in part, set up the Office of Government Ethics to "provide overall direction of executive branch policies related to preventing conflicts of interest."

Now, that has never been a small task: it is no less so now when we are confronted with allegations of improprieties in a number of agencies. Clearly the Congress was wise when it established the Office of Government Ethics, and I welcome this hearing this morning, Mr. Chairman, and your chairmanship of it.

It is an opportunity to explore whether the Office of Government Ethics can adequately perform this function under its present structure. I have two specific suggestions which I think might enable the Office of Government Ethics to carry out its mission more effectively:

First, I believe the Director of the Office of Government Ethics should serve a fixed term rather than at the pleasure of the President, as he now does. The potential of any President to influence or appear to influence a Director's decisions clearly exists as long as the director serves at the pleasure of the President.

If the Director's term were fixed, moreover, he would also then be in office during a Presidential transition, when his services are most needed.

Second, we should also consider giving the Office of Government Ethics a greater measure of independence in other ways. Now a part of the Office of Personnel Management, the Office of Government Ethics totally depends upon OPM and its politically appointed director for its budget request, its staffing decisions, and finally, its permission to issue its regulations. That arrangement should be changed.

In short, Mr. Chairman, the challenge to preserve the integrity of our democratic government still exists, as it always will. We must make certain that the Office of Government Ethics has the

independence and authority to act. By considering some structural changes, perhaps we can strengthen the Office of Government Ethics and underline Congress' original insistence that ethics in government not only be a goal but become a reality.

Thank you, Mr. Chairman.

Senator COHEN. Thank you very much, Senator Levin.

I might just begin where Senator Levin has left off. Mr. Scott, in your December 10, 1982 response to a letter that I had sent to you, I asked you about specific recommendations that you would make as far as strengthening this particular act, and you stated that the director should have a set term of office and be removable only for good cause.[1]

I notice in your written testimony today you stated that there is no compelling reason to change the terms of appointment for removal of the director. I was wondering why there is a discrepancy between what you wrote to me in December and what you have said here today.

Mr. SCOTT. Mr. Chairman, in December in response to your questions, I wrote you the views of myself and the Office of Government Ethics. The written statement that I have given to you for today's hearing was a statement that went through OMB clearance, and the written statement represents an administration policy.

The views that you have from December 10 represent my views and the Office of Government Ethics' views.

Senator COHEN. Did you submit your views to OMB or to administration officials on your recommendations on how to strengthen the act?

Mr. SCOTT. Yes, I did.

Senator COHEN. Those obviously were rejected?

Mr. SCOTT. Some were modified and some were rejected, yes.

Senator COHEN. Your view is the one stated in your response to me in December. You agree with Senator Levin and others on the committee that we ought to make the position more independent by making the director removable for good cause only and by giving the director a set term?

Mr. SCOTT. As briefly as I can state it, yes, Mr. Chairman. As I say, that December letter was not cleared by anybody; it was my views and the views of our Office only.

Senator COHEN. Sometimes those are the best—the ones that don't get cleared. We find there is a problem when it goes to so many different departments in the executive branch. Thank you very much on that, Mr. Scott.

You indicated that over 800 disclosure statements were sent to the Senate confirmation committees within 4 days of the Senate hearings. In all of those cases, were the problems actually resolved, or were there plans made to resolve the issues that were raised by the disclosure statements?

Mr. SCOTT. Yes, before we will sign the statements, the conflict problems must be either resolved or there must be a plan that the nominee has agreed to, to make them in compliance with the law before we will sign the report.

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[1]See p. 133.

So therefore the answer would be yes.

Senator COHEN. Does the OGE monitor compliance?

Mr. SCOTT. Mr. Chairman, yes, we do. We like to think that this is really the first time in the executive branch this has ever been followed up. Mr. Covaleski's section, his management analysts, go into the agencies and do spot checks and followups on whether the undertakings have been followed through.

Senator COHEN. Does your department ever issue a public report concerning findings on whether a public official has in fact violated ethical standards or laws? Does the OGE ever issue a public statement, or is it all kept within house? How does that operate?

Mr. SCOTT. Mr. Chairman, I would answer that question by saying we feel that normally we do not—in the huge majority of cases when we take actions—we do not issue a public statement.

The reason for that—and we have thought about this long and hard—is that our primary mission, we feel, is to prevent conflicts of interest and to bring people into compliance.

There's obviously a lot of confidential negotiations that go on. There is a lot of data which is private that is given to us, and we feel that if we made a statement about every problem that came into our office, that it would cut down on our effectiveness incredibly. It would also cut down on the number of people who would be willing to deal with us. We, therefore, feel we can better bring people into compliance with the conflict-of-interest laws—it is usually more in our interest not to issue a public statement.

I would have to add, in regard to Senator Rudman's questions, that there are exceptional cases which receive attention—which we think afford an opportunity to enhance the public's understanding of what some of these ethics issues are.

And the whole ethics in Government program would be advanced if we made a public statement.

Senator COHEN. And that should be done on an ad hoc basis? Who determines whether it should be made public or not?

Is it because a particular case gets a lot of public attention and because it is a highly visible issue? I would agree with you that you should not make a public statement on every person that you have to inquire about, as opposed to investigate.

But what about the more visible cases? I notice, for example, the Attorney General also had an inquiry made by OGE. William French Smith and James Watt, Secretary of the Interior, had questions raised about their disclosure statements.

Are those the kinds of cases that should have a public statement: where there is a danger that higher officials will have a different view than yours and yours might be suppressed? Or you think you should have a public disclosure?

Mr. SCOTT. I do not think there is that danger.

If I might, each case is a little different. For example, we always make opinions, when we get asked for an opinion, we always make those publicly available, with the names deleted. So, that is a so-called advisory opinion.

In an instance like the Attorney General's that you mentioned, that came up through the review of his public financial disclosure report.

And that was an instance where nobody was asking us for an opinion, but since we had to review the form, there was a question of what we felt the facts were at the time, what had to be done to have him in compliance with the laws.

And, therefore, it would be exactly the type of instance where we would normally not issue a public statement as long as actions or events took place that we felt warranted our signing the public-disclosure report.

Senator COHEN. Suppose your views were disregarded? Would you then make a public statement saying that the OGE feels its interpretation of conflict of interest is the correct one, as opposed to, let's say, the Justice Department or OPM?

How would you handle that?

Mr. SCOTT. Mr. Chairman, I am happy to sit here before you and say that no one has really disregarded us so far. But if they did, I think that we would go public.

Senator COHEN. We are not talking about whether they have in this particular instance, or any instances, but whether or not we formulate a law so as to protect the future as well. You might have an administration which could, within the parameters of the looseness of the language or the lack of guidelines, nonetheless suppress certain information, and you would not go public with it.

But what you are saying is if you felt that your recommendation for a high-level official were being disregarded, you would feel compelled to issue a public statement to define what your interpretation of the conflict-of-interest statutes are?

Mr. SCOTT. Absolutely.

Senator COHEN. Have you ever received pressure from the White House, or the Department of Justice, or OPM to approve certain disclosure forms?

Mr. SCOTT. No, we have not, Mr. Chairman.

Senator COHEN. If you learn about a significant problem in an agency, similar to the story Senator Rudman was obliquely referring to, which I think was EPA, over on the House side, how would you get involved, assuming this issue is not brought to you directly?

You're not an investigatory body. You do not have the staff or the budget to be an investigative body, although some recommend that you become one.

How would you get involved? Do you simply wait until the newspaper starts writing about it or until there are hearings? Where would you get involved in a situation like EPA with allegations of conflict of interest?

Mr. SCOTT. Mr. Chairman, we have an interesting way of getting involved in things, because certainly the press does like to talk to us and bring us problems. And, of course, we welcome that.

But, in fact, for a lot of other problems—we have what might be called an informal network of people, not only the designated agency ethics officials in the various agencies—if we discuss EPA as the example—but all the agencies which bring us problems.

And then we have what I always categorize as anonymous informers. And while, of course, many times they are off base and they will waste our time, we do receive those. And then, we will figure that if there is enough—if it seems like there is enough—

substance to what they are saying, we will then make an inquiry to see that someone is looking at the problem.

Senator COHEN. Have you ever found a situation where the designated ethics official within an agency has not been exercising independent judgment?

Have you ever found that perhaps they are being pressured within the agency itself?

Mr. SCOTT. Yes, Mr. Chairman. We have—happily, not often. But that situation has come up.

We sometimes will suggest that if they themselves feel pressured that the independence of our office can help, and we will help make the decisions.

In other instances, the solution was to ask the inspector general of that agency to get involved instead of the designated agency ethics official.

And then I can say in a few instances we have had both, problems with both the inspector general and the designated official, and we have asked another inspector general of another agency to get involved.

Senator COHEN. What about the housing of that designated agency official? As I understand it, he or she is within the General Counsel's office.

Mr. SCOTT. Typically so.

Senator COHEN. Should that person be brought into the inspector general's office, as opposed to the General Counsel? Would that be a positive recommendation, in your judgment, in order to insure more independence?

Mr. SCOTT. I know that there is, completely apart from the Ethics in Government Act, there is a debate on this. From our vantage point, I do not see any particular advantage to it.

Granted, in individual cases, the inspector general feels that he or she needs his or her own counsel. But the Ethics in Government Act, as I am sure you know, Mr. Chairman, did not really talk about inspector generals, per se. It just talked about designated agency ethics officials.

Senator COHEN. If the financial disclosure statement of the appointee requiring Senate confirmation reveals questionable factors, such as severance payments, that would create a conflict of interest, how do you resolve that? What is your procedure?

Mr. SCOTT. A prospective nominee?

Senator COHEN. Yes.

Mr. SCOTT. Again, the major thing is that we will not sign the statement until we feel that the person who has the severance payment has satisfied us that there is not a conflict of interest.

In individual cases, what that amounts to is finding out, first of all, the circumstances which gave rise to that severance payment.

And, of course, as again I am sure you know, there is nothing wrong, per se, with a severance payment, but it is the intent in giving it. And we have to try and define that intent by either seeing the severance payment, looking at boards of directors' minutes, et cetera, et cetera.

Senator COHEN. I am starting to inquire into an area that is sensitive—an ongoing inquiry, as opposed to investigation, that has received a lot of public attention.

As you know, there is a distinction between congressional rules and executive branch rules in terms of the limitations on outside income, the writing of books, et cetera. But I was looking at the articles that had been written on that subject matter. Apparently the allegations concerning conflict of interest in the situation involve, I think, three basic rules or laws. Is that correct?

According to one article that I read, you apparently, in a memo, indicated that—again, putting it hypothetically if we can, but in the general context—if you have a deferred compensation, or as Senator Rudman called it, constructive receipt, such an arrangement would be violative of section 210 of the Ethics Act. Is that correct or is that incorrect?

Forgetting the specific case for the moment, if you have a contract by a White House official—and we will not get into whether or not the official is Senate confirmed—would a deferred compensation contract violate, in your judgment, section 210?

Mr. SCOTT. Mr. Chairman, the best way I can answer that is that we did write a guideline on our interpretation of section 210 in this field, and it had to do with books.

Yes, we did, in general, say that section 210 of the Ethics in Government Act has an attribution rule that states you can't get around section 210 by, let's say, an event, that you will get $50,000 and just say: "I will get $10,000 this year, $10,000 next year, et cetera." We affirmed that attribution rule.

However, in the specific instance of book royalties, that, of course, as we said in our memorandum, that presents a lot of very difficult problems, because what we did—what we tried to do in our memorandum—is set out the fact that attribution rules apply to the payments that go to make you write the book. And that is the so-called advance against royalties when you start the book and maybe the completion of those advances when you finish the manuscript.

But then, we found that once that is completed, because those were the underlying purposes of section 210, that then, if you start to earn royalties from that book, once completed, that that was a mere property right and that would not be attributed to the writer for purposes of section 210. That was what the memorandum that received some play in the press said.

Senator COHEN. That was a general guideline, rather than being in response to the specific inquiry?

Mr. SCOTT. Exactly.

In regard to the specific inquiry, the White House official in question is not, by law, subject to this section 210.

Senator COHEN. Right.

But as a matter of policy, he is.

Mr. SCOTT. I understand there is a policy at the White House, yes.

Senator COHEN. You say you understand there is a policy.

Has that not been the practice over the years? Or is it just this administration's policy?

Mr. SCOTT. I honestly cannot answer that question. This is the first time I am aware of it.

Senator COHEN. This is the first time—under this administration—that section 210 has been applied to nonconfirmed members of the White House staff?

Mr. SCOTT. That's right. But section 210 is new, so it would not have come into play until 1978.

Senator COHEN. Tell me about President Johnson's Executive order—which some might find somewhat inconsistent with the origination of that particular order, but that is another matter.

Tell me about LBJ's Executive order.

Mr. SCOTT. In brief, Mr. Chairman, that set forth standards of conduct for all the executive branch employees. And, of course, it dealt with recurring ethical problems, such as when you can moonlight, the acceptance of gifts, the acceptance of honoraria.

It set up a confidential disclosure system for the first time, which now includes approximately 98,000 executive branch persons. It was basically the standards which all executive branch employees must follow.

From that, the then-Civil Service Commission issued regulations that interpreted that Executive order, and they still exist today.

Senator COHEN. Senator Rudman asked you a question as to whether or not you felt that even nonconfirmed White House officials, because of their high position, should be subject to the same laws.

Is it your judgment that even though this is a matter of policy of this administration, it is a good policy to follow, so that it should become part of the law, and become the general rule for confirmed and nonconfirmed? Forgetting the specifics for the moment, if you have high-level White House officials in any administration who are not subject to confirmation, if it is a matter of policy within this administration, is it a good policy to apply it?

And if it is a good policy, should it become part of the law, rather than be subject to the whims or discretions of an individual administration?

Mr. SCOTT. If I might, just speaking in my personal capacity, I think if section 210 is on the books as a law, I think it is a good policy.

However, as I think I may have indicated to some of your staff members earlier, I personally think that section 210 is a very difficult law to administer. And therefore, really, the better solution would be to get rid of section 210, because the standards of conduct—the Lyndon Johnson Executive order you just mentioned—really cover the same area, and you would not get these very difficult interpretive problems that we find ourselves facing.

Senator COHEN. Section 210 puts a limitation on outside income, doesn't it?

Mr. SCOTT. That's right.

Senator COHEN. Tell me a little bit more about LBJ's Executive order. I'm not familiar with——

Mr. SCOTT. The reason why I say what I just did is that section 210 is duplicative, that the legislative history of section 210 limiting outside earned income really, we feel, gets to two underlying problems.

One, is that it is trying to prevent high-level officials from using their Government position to earn money.

Another is this outside-time limitation that is involved, that you are trying to bring these senior officials back to do their Government jobs and prevent them from just being out giving speeches or writing books all the time.

The Lyndon Johnson Executive order actually has those exact same concepts, that you are supposed to give a full day's work for your Government job for a full day's pay, and you are not supposed to use your Government position for private gain.

So, the two underlying concepts are there, and I repeat, these are my personal views.

Senator COHEN. To the extent that section 210 does remain part of the law, you would think that it ought to be applied to confirmed and nonconfirmed White House officials as well?

Is that fair? To the extent that it is part of the law as it is?

Mr. SCOTT. The law is the law, of course, but it is a good policy.

Senator COHEN. It is a good policy?

Mr. SCOTT. Yes.

Senator COHEN. I will yield to Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman.

You have cleared your statement this morning with OMB?

Mr. SCOTT. My written statement and my oral statement?

Senator LEVIN. Either one.

Mr. SCOTT. Of course, my written statement, Senator Levin. And my oral statement really is a summary of my written statement.

Senator LEVIN. But the written statement is cleared with OMB as a matter of administration policy?

Mr. SCOTT. That's correct.

Senator LEVIN. Do you think that creates problems for an Ethics Office to have to clear its statements with OMB on how we can improve ethics in Government?

Mr. SCOTT. Senator Levin, I guess that the written statement that I have given to you this morning—that is administration policy.

Senator LEVIN. I understand that. Doesn't it create problems when an office which is supposed to give us its view on ethics, free from any political pressure, has to clear a statement on ethics with OMB?

Let me give you an example. Do you think it would be improper for you to clear your recommendation on Mr. Deaver with OMB?

Mr. SCOTT. I certainly think that would be improper.

Senator LEVIN. Why would that be improper?

Mr. SCOTT. Senator Levin, we have been given statutory responsibilities, and Congress has made very clear what most of those responsibilities are.

If we had what we thought was interference from either OMB, the White House, or other parts of OPM, on our statutory responsibilities, we would feel that we were not being free to do what Congress asked us to do.

Senator LEVIN. But clearing your statement on how we can improve ethics in Government, you don't feel is interference?

Mr. SCOTT. If I might go back to what I replied to Senator Cohen, I think we are certainly part of the administration.

But on the other hand, I would feel free, as I have this morning already, to give my personal views and the views of this office.

I would be very unhappy if I could not do that.

Senator LEVIN. In terms of your written statement, which is your written statement of the Ethics Office, do you think that a written statement on an ethical question such as how we can improve the Ethics Office, should have to be cleared with OMB?

What is your personal feeling about that?

Mr. SCOTT. As I say, I feel mixed. I definitely want to give you my opinion, and I think I have. And I think the committee has my personal views and the views of our office.

Senator LEVIN. What is your personal opinion on whether or not your opinion on how to improve the Ethics Office should be cleared with OMB?

Mr. SCOTT. My personal opinion? Well, I guess as shortly as I can say, I would prefer not to have to do that.

Senator LEVIN. I am very much troubled by it. It seems to me the greatest proof of the needs for an independent Ethics Office is the fact that a statement on ethics—a pretty critical procedural statement, whether or not the Ethics Office ought to be independent—is cleared with OMB.

Now, that is a pretty dramatic bit of proof, it seems to me, of the need for the head of the Ethics Office to be independent.

Mr. SCOTT. I think, of course, Senator—I think the process, what is basically required, of course, is that all executive branch written testimony before Congress has to have OMB clearance; we're not being singled out.

Senator LEVIN. I don't much understand this OMB and how it functions.

Mr. SCOTT. I'm sure you understand it much better than I do. By the same token, I can't see why, for example, we cannot talk, as Senator Cohen wanted us to do, about our relations with OPM, or as you say, the director, the term of that office in OGE.

I can see how that would be what might be called a structural administration point of view, and that they would have a different point of view from us.

That is understandable. I guess every administration has a point of view of how the executive branch entities should interrelate.

On the other hand, if you phrase it the way you do, I think certainly—certainly we would want to have our own views heard.

Senator COHEN. When you come up before this committee, do you feel free to tell us your own views, without regard to being pressured into conforming to the confines of your testimonial presentation?

Mr. SCOTT. Senator Cohen, I feel very free. Some people tell me I'm too free. I do feel free.

At the same time, I have to answer as I have to Senator Levin that we go through the process that everybody else goes through.

Senator COHEN. If Senator Levin or anyone else directs a question to you would you feel free to tell us your personal view, even though it might be inconsistent or in addition to what is in your written testimony?

Mr. SCOTT. Absolutely, Senator Cohen. I think I've already done that here this morning.

Senator COHEN. I think you have, too.

Senator LEVIN. I admire you for it. I'm trying to look at the structure which puts you in that situation, and I do not admire the structure.

I do not admire a structure which has the head of an agency rendering ethics opinion on high administration officials being beholden to the President for his job. I don't admire that structure one bit. I gather you don't, either. That's what your letter to Senator Cohen reflects.

It does not in any way diminish my admiration for your willingness to get up and speak, but I'm interested in the structure and the appearance, and I think the appearance really is pretty bad, when an office, the head of which is appointed by the President, is rendering ethics opinions on Messrs. Deaver and Casey, et al, and whether or not they should have their stocks put in blind trust, whether they should be able to collect royalties now or later on books.

Whatever the issue is, I do not care if it is this administration or any other administration, and it has nothing to do with which administration it is, I think the appearance of an Ethics Office, an Ethics Office rendering opinions on those kinds of questions when the head of that office can be removed at will by the President of the United States, undermines and diminishes the credibility of those opinions.

The appearance is not as credible as it should be. You have said that you have never been—I'm trying to find your exact words. Basically the administration has never interfered with any decision or opinion of yours, I believe your word is.

Mr. SCOTT. That's correct, Senator.

Senator LEVIN. There, obviously, are conversations between you, the administration, and its representatives on issues.

Mr. SCOTT. That represents—I'm sorry?

Senator LEVIN. There, obviously, are conversations all the time between you and the administration.

Mr. SCOTT. Absolutely.

Senator LEVIN. On various matters before you?

Mr. SCOTT. Absolutely.

Senator LEVIN. You do not—you have not constituted any of those as interference?

Mr. SCOTT. Absolutely not. The Administration has been very careful, and in my opinion, very good to not even come close to doing that.

Senator LEVIN. In terms of the appearance issue, when you now have in front of you an issue which affects one of the key assistants to the White House, whether or not the reality is one of interference or not; the appearance, I think you will agree does not lend itself to any great confidence in the system?

Mr. SCOTT. I am in an anomolous position. You already have my views in the December letter. But I would say this, Senator Levin. That in regard to issuing opinions in individual cases, no one has tried to——

Senator LEVIN. I'm talking about the appearance.

Mr. SCOTT. I understand you are making a different point. All I can say is that in clearing my testimony, and going through the OMB clearance process, that really has to do with the issue of the

reauthorization of the office; and the structure of OGE really does not have anything to do, and never has had anything to do with individual cases.

Senator COHEN. May I interpose as to whether or not we have an irony of sorts. That if you were in fact the fully confirmed director of OGE, you would be subject to removal at the will of the President.

But as you are only an acting director and a career public servant, you probably have more independence than a confirmed director.

Is that not true in your own situation? They can remove you from the acting director's position, but you are really a career public servant that cannot be removed?

Mr. SCOTT. I suppose I have a few more protections.

Senator LEVIN. Perhaps one of the things we ought to look at is to make sure that there is always just an acting director. [Laughter.]

Getting back to the appearance issue, wouldn't you agree that regardless of what the reality is—whether you constitute phone calls, inquiries, suggestions, whatever that conversation is, inflections of voices, the way words are phrased, whether you consider that interference or not—that there is an appearance problem? When the head of the agency which renders opinions on ethics of high administration officials, the closest advisers to the President, is in turn subject to the will, whim, and caprice of that President?

Isn't that the problem you are pointing out in your letter to Senator Cohen?

Mr. SCOTT. Again, speaking personally, Senator Levin, of course that is one of the problems that I perceive. I perceive again that we are a small office. My own personal view is that we need more institutional independence.

Senator LEVIN. The head of that office should not be beholden to anyone or subject to removal except for cause; isn't that clear? If he's going to be rendering opinions on the most sensitive ethics questions?

Mr. SCOTT. I know—there is another way of phrasing that.

Senator LEVIN. Remember, you are acting director still. You can give us yes or no answers, unlike your predecessors—I should not say predecessor. Unlike, perhaps——

Senator COHEN. The predecessor is following——

Senator LEVIN. I meant to say your successor, may or may not be able to give us yes or no. Your predecessor can't give us yes or no answers. He is no longer in office. Maybe he could when he was in office. Maybe he was able to do that.

But isn't there really a problem, just stripping this thing off, of the stuff that goes with these kinds of issues? Isn't there an appearance problem?

And I will repeat my question.

When the director of an agency that renders ethical opinions on the highest officials in the administration, let's take the key advisers to the President, and I'm not picking on this President. It does not make any difference who the President is. When the head of that office can be removed without any cause by that President, isn't there an appearance problem, at a minimum?

Mr. SCOTT. Again, my personal view is that there is. I am certainly aware of many other views that disagree with mine.

Senator LEVIN. Let me ask you a couple of specific questions. One, to follow up what Senator Rudman asked you. I did not quite understand your answer to his question on how would you enforce an opinion—he was referring to this royalty issue.

Let's assume your opinion is that the contract violates section 210, which by policy is applied to these particular officers. How would you enforce that if it was not agreed to by the White House?

Mr. SCOTT. Senator Levin, that is another excellent question. It gets into the fact that, again, in my personal views, the section 210 problems have really no sanctions attached to them.

And that is one of the many problems——

Senator LEVIN. They are not covered by subsection 9; is that what you are saying at 402, that you can order corrective action on the part of agencies and employees which the director deems necessary?

Mr. SCOTT. Yes, we can certainly take action. But what I am saying is that I thought your question was implying that the action there would be to suggest giving money back.

Senator LEVIN. You agree that it should apply as a matter of policy, as long as it applies to the officials that are confirmed? They ought to apply to other ones, as well? You agreed to that in your statement to Senator Cohen, that that is what the policy should be.

Now, my question is, since you agree that is what the policy should be as long as section 210 is on the books, do you have the power to order corrective action under subsection 9 of——

Mr. SCOTT. We would take the position we do. I will immediately say that as to section 210, you have to make a leap to say what are the sanctions for problems under section 210?

I happen to agree with your question that that would be one of the things that we could do, but the act itself is silent on it.

Senator LEVIN. As long as you are Acting Director, you would argue that subsection (9) gives you the power to order corrective actions for violations of section 210.

Mr. SCOTT. That is one of our powers, yes. That is my interpretation.

Senator LEVIN. As a matter of policy, since you have that discretion, you would apply it even to the nonconfirmed officials.

Mr. SCOTT. There, Senator, you are getting back to what Senator Cohen asked me. As I understand it, if, in any given case, the person that we are looking at himself was not subject to section 210 by law, I do not see how we could. I would have to reserve judgment on that. What we would, in effect, requested to do, would be to effect a policy that was not part of the law.

Senator LEVIN. Just reading subsection 10, it says "Ordering corrective action on the part of agencies and employees which the Director deems necessary."

You have told us this morning that you believe section 210 should apply to all officials, as long as it applies to the ones that are confirmed. As long as it is on the books as a matter of policy, it should, so you would deem it necessary to apply it.

Mr. SCOTT. But you see, Senator, the problem I have with that is that we cannot—if somebody has a policy and some of the policies in the various agencies differ, we feel that we cannot apply part of the law, and say that you must take corrective action based on a voluntary policy at this point. I think that is the problem we face there.

Senator LEVIN. You do not think you have the power to order it, or that the policy is proper?

Mr. SCOTT. I am saying that I reserve judgment in the individual case. If it was something where we feel that there were some other problems attached with it that might call for corrective action, I make no——

Senator COHEN. I think what Mr. Scott said in response to my questions is that if section 210 is a good policy it ought to be extended by law to confirmed and nonconfirmed alike.

What you are saying in response to Senator Levin is something different, that, namely, you do not feel that you necessarily have the power to enforce an opinion, since it is based upon an informal policy, as opposed to a prescribed regulation or statutory law.

Mr. SCOTT. That is a much better way than I have said it.

Senator LEVIN. I just have one question about the honoraria and the delayed revenue. Have you rendered opinions that you cannot receive any portion of an honoraria later, that that would be considered income for the 15 percent rule?

Mr. SCOTT. We issued guidelines that I believe Senator Rudman was asking me about and, yes; we have issued a guideline on that.

Senator LEVIN. Is that the gist of it, that delayed income counts?

Mr. SCOTT. It is an interpretation of section 210, trying to get at the attribution rule that I was attempting to explain.

Senator LEVIN. Is that the gist of it, that delayed income counts now?

Mr. SCOTT. Again, it came out in the context of book royalties, and we made a distinction that if——

Senator LEVIN. I'm taking honoraria. My deal was I got honoraria within the 15 percent. And after I'm out of the White House or administration, or whatever, that they will pay me the balance of what is owing, later, but that would still count toward income for purposes of section 210.

Mr. SCOTT. Yes; if an honorarium was for a speech or something like that, and the event that triggered you getting money was in a particular year, we have issued an opinion to say that you cannot get around that by saying that we will space out the payments.

Senator LEVIN. I designate a charity for honoraria. Does that count? Can you get around the rule by designating a charity?

Mr. SCOTT. Not if you say that I will not take the money myself, but I want you to give it to my favorite charity, if you direct that.

Senator LEVIN. That still counts toward the 15 percent. It will push you over.

Mr. SCOTT. That is correct. That is an example of constructive receipt, we feel.

Senator LEVIN. I have a few more questions, but I will withhold. Thank you, Mr. Chairman.

Senator COHEN. Just a couple more along this line. You indicated before you are about to file a report within the next couple of weeks. Is that correct?

Mr. SCOTT. Yes; the next couple weeks. As I say, we are trying to resolve some factual problems.

Senator COHEN. Now, to whom would that report go?

Mr. SCOTT. Mr. Chairman, I think that that report would be just for public release. That we would give it to—obviously, to Fred Fielding, who is the designated agency ethics official for the White House, who has counseled the particular individual on this matter. We would make it available to the press. We would probably send it to all of the designated agency officials.

As I said before, the reason why we would issue it, is that we feel, since there has been some questions on it, that we would advance the public's understanding of what the issues are.

Senator COHEN. Getting back to Senator Levin's question about enforcement, it comes to an issue of how one can enforce section 210. I think you indicated before that it is not really self-enforcing. Even though you personally feel that you could order corrective action, there are those who dispute that.

Mr. SCOTT. Correct.

Senator COHEN. Nonetheless, I think we tie it back into your earlier testimony, and that is that you do have another type of enforcement: Making a public statement in terms of your interpretation of the rules.

So conceivably, you could come down and say that, "Our interpretation of section 210 is as follows: Even though there is disagreement as to whether it applies here, our interpretation would be that perhaps it should, as a matter of policy." Is that fair?

Mr. SCOTT. That is fair.

Senator COHEN. A final question is that there has been a question by implication that there has been foot-dragging on OGE's part, or that political pressure has been exerted as far as the filing of the report. What you've said today is that really the time is necessary to complete the analysis of the contractual arrangements or factual matters.

Is that the reason for the delay?

Mr. SCOTT. I would not even say there is delay, Mr. Chairman, but yes, that is correct. I am still, frankly, puzzled, there is another person on the staff who is helping me, but I am puzzled by what we found so far.

I would like to understand the situation a little more than I do now.

Senator COHEN. We would expect a report within the next several weeks to be made public.

Mr. SCOTT. Yes.

Senator COHEN. Let me turn to another issue just for a moment. Do you think that the administrative changes to give OGE a separate line item within OPM's budget ought to be made? In other words, should it be a separate line item or not?

Mr. SCOTT. Yes, I do think that is a good idea. That certainly would go, I think, further to insuring that we get adequate budget review and funding.

Senator COHEN. Now in 1979, the GAO included that the EPA standards for employee conduct were inadequate. GAO found, for example, inconsistent interpretation of agency standards, a lack of employees' awareness of agency standards, and the failure to use information available to identify the weaknesses in the agency standards.

In 1982, when OGE reviewed the EPA's ethics programs, they concluded,

> The findings of our review team indicate that the EPA ethics program is generally an effective one, reflecting the concern, interest and effort that you and your staff have demonstrated in establishing and operating it.

Has there been a substantial improvement since 1979, or is there a discrepancy between your interpretation standards and that of GAO? Are you even familiar with the GAO conclusion on that?

Mr. SCOTT. I would defer to Mr. Covaleski, our monitoring and compliance supervisor. He was with the GAO, so perhaps he has more knowledge of it.

Senator COHEN. Would you give us some enlightment as to the difference between the GAO's analysis and that of OGE?

Mr. COVALESKI. Senator, I was not involved with the GAO report at that time in 1979. In 1979, I came with the Office of Government Ethics. What I would like to say is that, basically, since GAO did their report, a lot of changes have taken place, mainly because of the Ethics in Government Act, and almost all of the reviews we have found, the review process of the disclosure statements in the agencies has been greatly improved, because they have taken much stronger efforts to review the public disclosure statements, knowing that they are going to be made public.

Senator COHEN. You came with OGE, when? In 1979?

Mr. COVALESKI. I left GAO in September 1979 and came with the Office of Government Ethics; yes.

Senator COHEN. 1979 is when the GAO made the analysis of the EPA.

Mr. COVALESKI. Right. It was then. I knew some of the staff members involved, but I was not involved with that report at that time.

Senator COHEN. I'm sorry to have interrupted you. Do you want to complete your statement about the improvements that were made?

Mr. COVALESKI. When we went there to do our review, we took a look at the public disclosure system and how it operated. We found they had required reports. We reviewed many of them. Seven of them were missing, but they had already taken actions to collect the reports. We did find problems in the confidential disclosure systems, especially in several of the EPA regional offices. In two of the regional offices, the confidential disclosure reports had not been filed in certain years, mainly because there had been a turnover in the position of the regional designated agency ethics officials.

We also reviewed the Presidential appointee agreements that had been made. There were two appointees in at that time, and we reviewed those to make sure that they were living up to those agreements, which they were. EPA had taken efforts on their

standards of conduct to improve them and to increase the awareness of the employees.

The Inspector General at EPA was also starting a training program throughout the country, through a showing of the film with which we had been involved with the President's Council on Integrity and Efficiency. They also came up with several handbooks on standards of conduct, which at that time we thought were excellent materials, and which we were encouraging all of the agencies to do.

Since 1979, they have taken many strides to change their system to upgrade it.

Senator COHEN. Mr. Davis, we have ignored you for the last hour. Is there anything you want to add?

Mr. DAVIS. Senator, I would simply agree with the statements made by Mr. Scott. I would like to emphasize——

Senator COHEN. Which ones?

Mr. DAVIS. I think we have been talking about independence. We have been independent. My personal views are the same as Mr. Scott's. I don't think we have felt any pressure. I don't think we would hesitate to go public, if that is what it took to get our point across on a particular issue.

Senator COHEN. That may be your situation. What about structuring the law so that it applies to future administrations and future employees as well?

Mr. DAVIS. My personal opinion, sir, is that I think there is an appearance problem, and I think it would help. I think we can get along without it. Our current situation would permit us to go ahead and do a good job. It would help us to have a different structure. That is my personal opinion.

Senator COHEN. Senator Levin.

Senator LEVIN. Are you a career official, Mr. Davis?

Mr. DAVIS. Yes, sir, I am.

Senator LEVIN. Mr. Covaleski?

Mr. COVALESKI. Yes, I am.

Senator LEVIN. I think it is eloquent testimony that we have career officials here who are speaking in contradiction to the administration policy this morning, in terms of their own personal views. It is eloquent evidence of the value of independence. You are more independent, because your jobs are secure, as a matter of fact and a matter of appearance. You may be independent, even if your jobs weren't secure. [Laughter.]

You three may be able to come here and say, "The hell with it. I don't care if they fire me. I'm going to speak my mind."

But I can tell you one thing. A lot of folks aren't in that position, who have to maintain family lives and support a family, and we should not put people in that position. And the appearance is wrong, in any event. The reality is often wrong, too, when we put people in that position, but the appearance is always wrong. I think we've gone into it enough.

I am curious about the mechanism, though, about the OMB review of your statement this morning, and I am just wondering if you could tell me this. How do you work out with the OMB what position you are going to take on the question of changing the term of appointment or removal? Do you call them up and say, "Hey,

OMB, my position is that this thing ought to be independent, and that is what I would like to say."

Do you submit your draft to them, and they send it back with comments? What is the process for them to review and clear your statement?

Mr. SCOTT. Senator, again, I think that this happens to all agencies who present testimony to committees such as this, that we are required to submit a written statement that we prepared, and we submit it to OMB with copies, et cetera. They then will, of course, review it themselves. They will also send copies out for comment to other agencies, other interested executive branch bodies.

Obviously, that varies, depending upon what the testimony is.

In this case, it went to a number of different people in the administration, and then comes the crunch. The comments are received back by OMB and OMB informs us how they think the testimony that we have submitted should be changed.

Senator LEVIN. Do they give you the general guidelines of what you should say, or do they write paragraphs for you?

Mr. SCOTT. I think it can be a little bit of both.

Senator LEVIN. Who wrote the words——

Mr. SCOTT. There is some negotiation involved, and I think, as I understand it, this is a fairly typical practice.

Senator LEVIN. So that they will send you back a draft with some comments written in?

Mr. SCOTT. The time pressure is usually such that the comments come over the phone.

Senator LEVIN. On this paragraph, when you said in your written statement, "There is no compelling reason to change the terms of appointment and removal of the Director," which is very different from what you wrote to Senator Cohen a few months ago, in terms of your view that there is good reason to change the terms of appointment and removal of the Director, that line would have been negotiated over the phone between you and OMB?

Mr. SCOTT. Yes.

Senator LEVIN. Or was it written by OMB?

Mr. SCOTT. I think negotiation is a better word.

Senator LEVIN. Which is a more accurate word?

Mr. SCOTT. Senator, the negotiation part, of course, is that they will have some suggested language in certain places. We will say we really—we don't want it to sound that exact way, so we will then have our own way of maybe phrasing the idea, but obviously, the net result is in some respects a compromise.

Senator LEVIN. Would you consider that in any way OMB pressure or interference?

Mr. SCOTT. If you just asked me about the clearance process, I would say that is a lot of pressure.

Senator LEVIN. Thanks.

Senator COHEN. To keep it all in some perspective, I suppose it is like the editorial process that goes on within our own offices.

We have thousands of letters that we send out, we have thousands of memos prepared by staff that, when it is presented to our desk, we take a look at some of the language and say, "Wait a minute. I don't want to say that either as public policy or as a public statement. I want to strike it out and put a different word

in." So, we go through the same process ourselves. I don't think we ought to, in any way, misconstrue what we are saying here.

As I indicated before, Congress does not have the same limitations as they do in the executive branch. Many of us, myself included, write books or give speeches, or both, without the kind of restrictions that might be imposed on the executive branch. Second, we have our own policies that we try to implement.

So, I think it is within that gray area of saying, yes, we should have a uniform standard or policy to be implemented on the executive branch. That is fair. I do not disagree with that.

The difficulty that Senator Levin and I have encountered since we came to the Senate together is that we have found many cases—and I just want to commend you, Mr. Scott, for the way in which you have presented yourself this morning—even in our Armed Services Committee—when we listen to witnesses read a prepared statement that we know does not reflect their personal views. These are military leaders telling civilian overseers, as such, what the policy ought to be for the Congress to adopt.

We have had a good deal of difficulty in both administrations, not so much the recent administration but in past administrations, when we have had people come before us and not deviate, even when questioned, "What is your personal view, as opposed to your presented view in the statement?" They say, "I'm sorry. I'm not at liberty to give you that answer."

I recall one time that we even had the Joint Chiefs come before us in a closed session, at which we excluded all members of the staff and put the Joint Chiefs under oath. And it was not because we did not believe them, but because we had to protect them, to allow them to say "We had to tell the truth because we were under oath. We had to give them that response." I thought that really was going well beyond the call of our responsibilities to do that. It was necessary, however, because of so much pressure being generated upon the military, saying, "This is the line, and this is the standard presentation you will give. And there are no personal opinions."

So, on the one hand, there is a recognition that you have to have some uniformity of policy. I think all of us agree with that, because we have to have a uniform position when we are articulating our particular viewpoints in the Senate or back in our States or in other States.

On the other hand, I think that when Congress is charged with the responsibility of overseeing Government policy, ethics, whatever it might be, we do have a right to expect personal opinions, professional judgments, apart from that which may be sanitized to the point where it almost is like stale bread at times. Some statements that come to us have been so sanitized, so systematized, or whatever, that it is virtually useless for our purposes.

So, I think you have struck the right balance, Mr. Scott, Mr. Covaleski, and Mr. Davis, in coming before us and presenting the official statement, but nonetheless showing a willingness to give your own personal opinions. And we appreciate that very much.

Senator LEVIN. If I could just comment on that, I agree with much of what the chairman said in terms of an executive branch

having a right to speak with one voice on policy issues. It does not trouble me particularly.

I am deeply troubled when an agency which is given the authority to render judgment on ethical issues, ethical issues, has a Director subject to removal at the will, whim, and caprice of the people being judged. That troubles me a great deal. And I must say I am very much troubled, also, by that agency having to clear its judgment on an ethical issue with the OMB.

And let me tell you, whether or not the Director of this agency should be subject to removal by the President is a very severe ethical issue. I consider it an ethical issue—the budget a lot less so—of the agency. You could cut the budget enough so you could remove its capability of rendering ethical judgments. There are a lot of borderline issues. But on the gut issue, the independence—independence of this agency to render judgments—now, either we're going to make it an advisory group inside the executive branch, with no appearance of rendering objective and independent judgments—that's OK, they are entitled to have their counsel, that is one thing.

But if we are going to give it the aura of independence that it renders judgment—we have said, "Render judgment, monitor, investigate"—the word "investigate," by the way, is in the law—"conduct reviews, interpret, establish opinions, ordering corrective actions." These are words of independence.

And if we want to do that, we had better make sure it can carry out that mission. That is the exception to the general rule, which I think the chairman very correctly enunciated, that the executive branch does have a right to speak with one voice.

But the other part of the comments I very definitely agree with. We have to be careful when we give commissions to an agency to render independent judgment, that that is what we have told the public this agency can do.

You will reach judgment on the closest advisers to the President. That is damn near a sacred duty. If you were a court, I could use those terms. But it is pretty close to a sacred duty. That is pretty serious business.

I don't care if it is this President or any President, by the way. This is not a partisan or political issue. Every administration has got problems of conflicts of interest and so forth, something that this administration has more than most, but that is neither here nor there for this morning's hearing.

The point is that you have a trust that you have been given to judge, to render judgment. And in some cases it is public, and that is the issue and whether or not the Director has to be independent in order that that trust be carried out and appear to be carried out.

And I must tell you, from your reputation, you have carried out that trust. I've got to tell you that.

Mr. SCOTT. Thank you.

Senator LEVIN. You have done a wonderful job, from what I gather, of walking a very difficult road.

It is always a difficult road being in the executive branch and at the same time judging that same branch. It is just as difficult for us, as Senators, when we have to judge our colleagues. It ain't easy.

And I want to compliment you on your willingness to express your own views, your own independent, individual views on very critical structural issues of this agency.

You and your colleagues this morning I think are to be commended for being willing to say, "Hey, listen. We don't agree with the administration's views on this." And I think that is notable, noteworthy. And again, you have lived up to an important—I believe a very important command of the statute.

Mr. SCOTT. Thank you, Senator Levin.

Senator COHEN. Thank you very much gentlemen.

[Mr. Scott's prepared statement follows:]

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STATEMENT OF

DAVID R. SCOTT
ACTING DIRECTOR
OFFICE OF GOVERNMENT ETHICS

BEFORE
THE SUBCOMMITTEE ON OVERSIGHT OF
GOVERNMENT MANAGEMENT
OF
THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS

ON

S. 461
TO EXTEND THE AUTHORIZATION OF APPROPRIATIONS FOR THE
OFFICE OF GOVERNMENT ETHICS FOR FIVE YEARS

FEBRUARY 24, 198[illegible]

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I appreciate your invitation to appear before this Subcommittee to present the views of the Office of Government Ethics (OGE) on Senate Bill 461, legislation to extend the appropriations authority of this Office for a period of five years beyond its present expiration date of September 30, 1983. In response to your request, I will also present several recommendations to amend Titles II, IV, and V of the Ethics in Government Act of 1978, as amended, (the Act) concerning the financial disclosure provisions, the structure of the Office of Government Ethics, and the post employment prohibitions respectively.

FUNCTIONS OF OGE

Title IV of the Ethics in Government Act of 1978 established OGE to provide overall direction of Executive Branch policies related to preventing conflicts of interest. In particular, the work of the Office involves Executive Branch personnel financial disclosure requirements; "revolving door" or post employment conflicts of interest; all other criminal conflict of interest statutes; and Executive Branch employee responsibilities and standards of conduct.

The Act gave OGE an important role in the Presidential appointment process. In regard to every Presidential nominee requiring Senate confirmation, the Director of OGE must sign the nominee's public financial disclosure report and deliver it to the Chairman of the Senate committee of confirmation, together with an opinion letter affirming the nominee's compliance with all applicable conflict of interest laws and regulations. The recent practice of the Senate committees is to regard receipt of the OGE opinion letter as a condition precedent to completion of a confirmation hearing.

Primary responsibility for administration of agency ethics programs rests with the head of each agency, who in turn must appoint a designated agency ethics official (DAEO). This agency ethics official's responsibilities are to administer the financial disclosure provisions of the Act, to manage the agency's ethics program, and to serve as a liaison to OGE. OGE serves as a central coordinating office providing leadership and

consistent guidance on conflict of interest issues to each designated agency ethics official.

The responsibilities of OGE are divided between the Chief Counsel and his staff of five attorneys, and the Deputy Director who oversees the Monitoring and Compliance Division staff of nine management analysts. Including support staff, OGE has a current authorized strength of 23.5 positions and is operating presently with a staff of 21 persons.

The Legal staff develops regulations and policies concerning various Executive Branch ethics matters. The Office has issued regulations implementing Titles II, IV, and V of the Act concerning the Executive personnel financial disclosure provisions, the operation of agency ethics programs, and the post employment conflicts of interest prohibitions respectively. We intend to seek a delegation of authority from the President to revise regulations under Executive Order 11222 concerning the confidential financial disclosure systems for Federal employees in positions below GS-16.

The Legal staff also renders advisory opinions on all kinds of ethics issues and responds to approximately 380 telephone inquiries per month, many of which are from the White House Counsel's Office or from private companies or firms. The attorneys review the public financial disclosure reports of Presidential nominees prior to their Senate confirmation hearings and consult with the appointees and/or the agency ethics officials as necessary to bring the appointees' financial interests into compliance with applicable Federal conflict of interest laws and regulations.

So that the agencies and the public may know how OGE is interpreting the various Federal conflict of interest and standards of conduct provisions, the most important of the OGE attorneys' opinions are circulated in digest form (with information identifying the parties deleted) to the agencies and to other interested persons and companies.

The Monitoring and Compliance staff of OGE conducts reviews of the adequacy and effectiveness of Federal agency ethics programs, including the public and confidential financial disclosure systems, standards of conduct regulations, and ethics training and counseling programs. In fiscal year 1982, the Compliance staff conducted reviews in 20 departments and agencies and in 115 regional offices and military installations in 14 metropolitan areas. The Compliance staff conducts training programs for agency ethics officials, employees, and other interested groups and has recently initiated a training program for regional ethics officials to be given in all ten standard Federal regions. The Compliance staff also reviews the annual and termination reports of approximately 900 Presidential appointees each year, and works closely with agency ethics officials to insure that such reports are accurate and complete.

In calendar years 1980 and 1981, the Office of Government Ethics sponsored two-day training conferences for agency ethics personnel with attendance on each occasion exceeding two hundred participants. In calendar year 1982, a one-day conference was held. Materials prepared at each of these conferences were made available to the agencies for continuing education purposes.

1981 PRESIDENTIAL TRANSITION

In the wake of the 1980 election, with the advent of a change in administrations, OGE was faced with the first Presidential transition under the Act. The test of the Office was whether it could review and process the public financial disclosure reports of Presidential nominees and render opinions to the Senate confirmation committees at the pace set by the White House nomination process. It immediately became clear that many legal and procedural issues had to be faced.

While OGE's Title II regulations issued in 1980 set forth expedited procedures in the case of Presidential nominees subject to Senate confirmation, neither the Act nor its legislative history adequately addressed how OGE should function during the transition period. For example, the Act presupposes that the President send nominations to the Senate to trigger the procedures for Executive Branch review and public release of financial disclosure reports. During the transition period, however, the President-Elect has no power to make nominations. Nonetheless, the conflict of interest review process had to go forward if the new Cabinet and other key officials were to be ready for confirmation when the President took office.

Following the election, OGE immediately developed lines of communication with the Presidential transition team and, subsequently, the White House Personnel Office and the Counsel to the President. Key staff members of each Senate confirmation committee were contacted to discuss operating procedures, and almost daily contacts were

maintained throughout the 1981 transition year. An OGE attorney was assigned to work with the transition team to smooth the process and to assist in any and all matters concerning the Act. A computer system was developed for OGE to keep track of the financial disclosure reports from approximately 800 appointees throughout the confirmation process and to be able to give a daily status report to the White House. A procedure was devised whereby the President-Elect's notice of "intent to nominate" was treated as tantamount to nomination for Executive Branch review purposes, and receipt of an intended candidate's financial report was deemed to be receipt of a form for purposes of public disclosure.

The procedures improvised by OGE worked well, although much of what was done was without statutory guidelines. The Ethics in Government Act is a new statute, and it left a number of questions unanswered. OGE's handling of the 1981 transition is but one example of administrative solutions being found for statutory problems.

During calendar year 1981, OGE received financial disclosure reports from 615 nominees. On the average, OGE sent the reviewed report with an opinion letter to the Senate confirmation committee within four days of the appointee's nomination by the President. All but fifteen reports were sent to the Senate prior to the first confirmation hearing by the Senate committee. Most of these fifteen reports were not received by OGE until after the first hearing had occurred. The financial interests of 354 of the 615 nominees required that actions be taken to shield them from conflicts of interests in their Government positions. The majority (70%) of these actions included resignations from prior positions or disqualification from taking actions in their Government positions

concerning companies in which they held financial interests.

The transition continued into 1982 with the reports of 328 additional nominees being received. While that total will undoubtedly decrease in 1983, we already can foresee that a substantial number of Presidential appointees' public financial disclosure forms will be reviewed by our Office this year.

Overall, despite initial fears and media reports that the Ethics in Government Act of 1978 would be a bottleneck in staffing the new Administration, this did not occur. Since 1981, over 1000 Presidential appointees have come into the Executive Branch of Government with almost every conceivable type of financial interest. Agreements reached with appointees to protect them and the Government against conflicts of interest have withstood the scrutiny of the Senate, the White House, public interest groups, the GAO, and the news media. We believe that the Office fully met the test provided by the transition in a highly professional and timely manner. The protections set in place for the nominee, the public, and the Government heightened the sense of integrity and openness in the Federal Government.

OGE'S RELATIONSHIP WITH OPM

Title IV of the Ethics Act established OGE as a statutory agency in the Office of Personnel Management. Section 402(a) specifies that OGE shall operate "under the general supervision" of OPM.

In general, this broad directive of section 402(a) of the Act has been carried out by OGE acting independently of OPM in its dealings with other federal agencies on issues involving substantive conflicts of interest (18 U.S.C. §§ 202-209) and standards of conduct (E.O. 11222 and 5 C.F.R. Part 735). On the other hand, OPM has at all times exercised administrative control over the budgetary, personnel, and logistical operations of OGE. For example, under the Act, OGE has the responsibility of drafting regulations to implement the Act's directives but must obtain OPM's approval of these regulations before issuing them in OPM's name. In practice, OPM's part in the whole process has been nominal, and it has accepted virtually all of the substantive recommendations that OGE has made on these regulations. Similarly, OGE has fulfilled its statutory responsibilities to oversee the public financial reporting program imposed by Title II of the Act and to render advisory opinions on various conflict of interest and ethical issues independently of OPM (as the Ethics Act requires).

The Director of OPM, Donald J. Devine, best explained this operational relationship when he submitted written testimony to an Oversight Hearing of the Subcommittee on Civil Service of the Committee on Post Office and Civil Service of the House of Representatives on September 22, 1981. The Subcommittee, noting that the new OPM organizational chart showed the Director of OGE reporting to the Deputy Director of OPM rather than to the Director, had asked why OGE was being downgraded. Director Devine responded:

> Simply stated, I have not downgraded the Office of Government Ethics (OGE). In implementing my management philosophy, I reduced the number of OPM organizations reporting directly to me. OGE was established as a special unit within OPM by the Ethics in

Government Act of 1978. That Office and its program, due to its effective leadership, runs with substantial independence and is very successful. Presently, the major point of interaction between the Director, OGE (a Presidential Appointee, subject to the advice and consent of the Senate), and my immediate office is in the area of assuring OGE prompt and adequate support from OPM's administrative offices (e.g., Personnel, Budget, Management) which, under the new organizational alignment, also report to the Deputy Director.

As Director Devine pointed out, OGE has an "advice and consent" Presidential appointee to carry out its statutorily defined programs and responsibilities. Consequently, OPM has seen its major role vis-a-vis OGE to be that of providing it with adequate support from OPM's administrative offices. OGE in fact is the only entity within OPM which has been statutorily created and therefore has distinct, Congressionally-mandated goals and duties which are not part of OPM's mandates under the Civil Service Reform Act of 1978.

BUDGET AND STAFF LEVELS

The budget and staff levels for OGE for fiscal years 1980 through 1984 are as follow:

	BUDGET LEVEL	STAFF LEVEL
FY 1980	$637,400	16
FY 1981	938,500	26
FY 1982	951,300	23.4
FY 1983	1,016,000	23.5
FY 1984(requested)	1,093,000	25.5

The actual staff level for FY 1981 was higher than that recommended by OPM for that fiscal year, since OPM at OGE's request subsequently authorized OGE to hire new employees in 1981 at the level projected for FY 1982. This was done in view of OGE's unique and enhanced responsibilities for administering the Act during the Presidential transition period.

It should be pointed out, however, that OGE received largely what it needed because of special pleas and agreements. Both Director Devine and Deputy Director Loretta Cornelius have been supportive of OGE and its mission. They have been responsive to direct appeals from the Office for necessary funds and additional staff, and thus far the Office has received adequate resources.

STRUCTURAL MODIFICATIONS

As noted, personnel and individual relationships with OPM have been positive and harmonious. OGE has been able to perform its statutory functions effectively and its independence has not been impinged upon by OPM's nominal control. OPM has been supportive of this Office. Therefore, structural and organizational changes are not necessary to assure independence and viability of the OGE.

A. Resources

As a part of OPM, OGE is subject to its management policy decisions; this can have a massive, unintended effect on our small Office. For example, when President Reagan directed a personnel freeze upon taking office in 1981, OGE was swept into it because it was treated like any other OPM entity. Had OGE been considered a separate agency for hiring purposes, it would have escaped an unnecessary hardship, because the freeze directive itself exempted agencies with less than 100 employees. Similarly when OPM reduced its budget in 1982 by means of reductions-in-force ("RIFs"), OGE first had to argue to OPM that "riffing" its tiny staff would be disastrous to its mission and was budgetarily unnecessary. Having been successful in that argument, OGE still had to absorb the resultant "bumps" from other personnel in OPM who were "riffed", and thereby OGE suffered dislocating personnel losses anyway.

Because of OGE's small staff and budget, a small ripple in OPM's budget and staffing plans becomes a tidal wave when it impacts on OGE. Accordingly, administrative changes are planned which would give OGE a separate line item within OPM's budget.This would ensure Congressionally-mandated review and funding for OGE, separating the Office from fluctuation in OPM's budget process.

B. OGE Director's Term of Office

The Act requires the Director to review the financial reports of Executive Branch appointees and to report his opinion on their conflicts, if any, to the Senate Committee

considering the nomination. The Director must be responsive to both the President and the Senate and yet keep his independence from both. To be effective, the Director must make difficult, delicate decisions in an independent, apolitical manner. He should have the confidence of the President but also should feel free to act apart from the President's wishes.

Nevertheless, as stated earlier, the Office has functioned effectively and without political interference in both Republican and Democratic administrations under the existing appointment system. There is no compelling reason to change the terms of appointment and removal of the Director.

C. OGE Sunset Date

We support the five year extension of appropriations authorization provided for in S. 461. The need for a centralized government ethics office has long been recognized. A 1960 report of the Association of the Bar of the City of New York recommended the establishment of such an office, noting that the administrative process could provide a viable alternative to "the broad axe of criminal prohibition" and could, in addition, reduce the risks the conflict of interest laws were intended to meet. In the years thereafter, various bills to create an ethics office were introduced. The GAO recommended the creation of such an office in a 1977 report. In remarks made at OGE's 1982 annual conference, Roswell Perkins, a major author of the New York Bar Study, deemed the creation of the Office of Government Ethics "by far the most important and positive accomplishment of the 1978 Act," in view of the fact that "it took nearly two decades . . . to get the job done, after strong and clear recommendations had been made to that effect."

The five year reauthorization will provide the appropriate means to review the activities of OGE while maintaining sufficient independence for effective performance of Office functions.

PROPOSED AMENDMENTS

In his letter inviting me to testify here today, Chairman Cohen asked that I include in my testimony any recommendations I might have for amending the financial disclosure and post employment provisions of the Ethics in Government Act. I will not discuss in detail any of my proposals but rather will briefly mention a few areas where improvements are needed. These proposals are not intended to be all inclusive but rather are aimed at those portions of the law which I believe are most in need of attention.

A. Financial Disclosure

1. Eliminate public financial disclosure by the career civil service.

The categories of government employees who must file public financial disclosure reports are both under-inclusive and over-inclusive, given the underlying purposes of the Act. All government employees classified at GS-16 or above and all military officers at grade 0-7 and above must file publicly, regardless of their official responsibilities. With certain exceptions, career employees classified below GS-16 do not have to file public

financial disclosure statements, again regardless of the nature of their responsibilities. Under existing law, a GS-16 personnel officer who never deals with the public is required to file publicly, while a GS-12 procurement officer who influences awards of multi-million dollar government contracts is not.

The ideal solution to this problem of over- and under-inclusiveness would be to identify specifically those positions in the Executive Branch which actually have a significant potential for conflicts of interest. However, the identification of sensitive positions throughout the Executive Branch would be an extremely difficult and time-consuming task. Therefore, I propose that the Act be amended simply to eliminate public disclosure by employees in the career civil and career military services. Requiring careerists to file confidential rather than public statements retains the simplicity of existing law but reaches a better balance between the privacy interests of government employees and the public's interest in preventing conflicts of interest.

There is legitimate debate within the Ethics community as to the need for and efficacy of public versus confidential financial statements, and this area should be considered by the Congress.

2. Clarify and simplify the blind trust rules.

Another area of the Act in which a number of problems have arisen is the portion dealing with blind trusts. The Act as written does not require anyone to have a blind trust.

Rather, the blind trust provisions are provided as tools to help government officials avoid potential conflicts of interest. I endorse the concept of blind trusts as one of the useful alternatives to remedy conflict of interest problems but feel strongly that some recurring problems under the Act should be rectified.

(a) Qualified diversified trusts should be available to all Executive Branch employees.

The Act presently recognizes two types of blind trusts: the qualified blind trust and the qualified diversified trust. The qualified diversified trust gives broader protection from conflict problems, because the assets placed into such a trust are deemed to be immediately "unknown" to the grantor-government official. The qualified blind trust only provides for "gradual blindness", because the original assets placed in the trust are not deemed to be "unknown" until disposed of or reduced to a value under $1,000.

For no articulated reason, the Act makes qualified blind trusts available to all Executive Branch officials, but limits the availability of qualified diversified trusts to Senate confirmed Presidential appointees in the Executive Branch. I believe this is inequitable. My recommendation is that qualified diversified trusts be made available throughout the Executive Branch.

(b) Provision should be made for blinding of "old family trusts."

An "old family trust" is a trust established prior to the effective date of the Act by an ancestor for the benefit of his descendants, one of whom is now a government official,

and which has holdings of which the official is aware. Under the Act as it now exists, a typical "old family trust", because it was not originally intended to establish blindness, cannot be later blinded by amendments to the trust instrument. Because the trust cannot be blinded, the government official must find out what the trust holds in order to report the trust assets. He is thereby limited in what official actions he may take under the criminal conflict of interest provision which makes it unlawful knowingly to take official action in a matter in which one has a financial interest. The non-government beneficiaries of the "old family trust" also suffer, because their trust holdings must be made public in the government official's financial disclosure report. I recommend that the Act be amended to allow the interested parties to an "old family trust" to agree, if possible, to blind the trust as to the government official who is a beneficiary.

(c) The concept of "excepted trust" should be clarified.

A third problem that has arisen in the trust area involves the concept of "excepted trust." An excepted trust is defined by the Act as one which was not created by the government official, his spouse, or any dependent child and the holdings or sources of income of which the official, his spouse, and any dependent child have "no knowledge." There are many benefits of having an excepted trust under the Act, and, not surprisingly, OGE has dealt with many cases involving government officials who claimed that trusts of which they were beneficiaries fell into the "excepted" category. Because the Act itself and the legislative history say virtually nothing about what was intended, OGE has had no guidelines by which to answer the difficult definitional questions which have arisen. Does a government official who knows that a trust of which he is a beneficiary holds stock of

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three domestic oil companies, but does not know precisely which ones, have "no knowledge" within the meaning of the Act? What about the official who knew three years ago what the trust held, but does not know what the trust owns now? Further statutory guidance is needed so that the excepted trust provisions can be administered in accordance with legislative intent.

B. Post Employment

The law governing post employment conflicts of interest has long been a subject of much debate. Title V of the Ethics in Government Act of 1978 revised the "revolving door" rules found in Section 207 of title 18, United States Code, and Section 207 was amended again in June of 1979. Unfortunately, some problems with the law remain, and I will mention those which are of particular concern to me.

1. Clarify 18 U.S.C. § 207(g)

The first has nothing actually to do with post employment per se. The provisions of 18 U.S.C. § 207(g) restrict the activities of partners of present day government employees. These restrictions were inappropriately placed in Section 207, when it was originally enacted in 1962, and they lie hidden there among a variety of post employment provisions. The result of the misplacement is that the restrictions on partners of present government employees are little known and often misunderstood. This kind of confusion is particulary undesirable in the case of a criminal statute, which Section 207 is. The provisions of Section 207(g) should be taken out of the post employment section and placed elsewhere in the Code.

Section 207(g) provides that "partners" of Executive Branch employees are prohibited from certain activities, but the statute does not define the term "partner". That term encompasses a broad range of contractual agreements, and it is not apparent from the legislative history that Congress intended this provision to apply in all cases. For example, I am doubtful that the provisions of Section 207(g) were intended to apply to the activities of other investors in a limited partnership in which a government official has a minor, passive investment interest, such as a publicly offered limited partnership investing in real estate. However, OGE has not been free to narrow the application of the statute in the absence of some expression of legislative intent. My recommendation is that Congress take another look at this area and impose appropriate limitations on the reach of Section 207(g).

2. Abolish designation of senior employees and designation of separate non-statutory components.

Two of the restrictions applicable to former government employees - the one year "cooling off" period established by 18 U.S.C. § 207(c) and the two-year ban in assisting on representing set forth in Section 207(b)(ii) - are only applicable to certain high level officials. These officials are listed in Section 207(d)(1) and include "senior employees" designated pursuant to Section 207(d)(1)(C) by the Office of Government Ethics in consultation with the department or agency concerned. Those eligible positions involving significant decision making or supervisory responsibility are to be designated. Section 207(d)(1)(C) also provides that, as to designated senior employees, the Director of the Office of Government Ethics may limit the restrictions of Section 207(c) to permit a

mer government official who served in a separate agency or bureau within a department or agency to make appearances before or communications to persons in an unrelated agency or bureau, within the same department or agency, having separate and distinct subject matter jurisdiction.

Experience has shown that the designation process is both unnecessary and unworkable. The senior employees who are eligible for designation under Subsection (d)(1)(C) are not ordinarily high enough in an agency's hierarchy to have the kind of influence that the ban of Section 207(c) was aimed against. In addition, OGE and the individual agencies have found the designation process extremely difficult to administer. The designation process requires a current position description of each eligible employee along with an explanation of where he or she fits into the organization's chain of command. This has proven to be a virtual impossibility in the light of frequent agency reorganizations, changes in administration, reductions in force, and other changes in personnel. The separate, non-statutory agency determinations are also too cumbersome to be administered effectively by OGE. The Act provides few meaningful standards to use in making the discretionary determinations required by Section 207(d)(1)(C), with the inevitable result that decisions are arbitrary and based on inadequate factual records. The section should be repealed.

In summary, Mr. Chairman, I want to express my support for legislation re-authorizing the Office of Government Ethics. While there are some problems with the Ethics in Government Act as written, these problems can be solved. However, there is no question but that OGE has successfully fulfilled its important obligation to provide overall direction of Executive Branch policies regarding conflicts of interest.

I will be happy to answer any questions you may have.

Senator COHEN. Our next witness is J. Jackson Walter, president, National Academy of Public Administration, former Director of the Office of Government Ethics.

As the only past-Director of OGE, your insights will be particularly helpful. As a matter of fact, you are the only full Director that OGE has ever had.

We appreciate your coming before us. We hope that you can at least summarize your written testimony, and we could ask you a few questions.

TESTIMONY OF J. JACKSON WALTER, PRESIDENT, NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, AND FORMER DIRECTOR, OFFICE OF GOVERNMENT ETHICS

Mr. WALTER. Thank you for asking me to appear before this subcommittee to testify on the 5-year reauthorization of appropriations for the Office of Government Ethics, as proposed in S. 461, which I endorse. Even better would be a permanent reauthorization, which I believe the record fully justifies.

Having been confirmed by the Senate and appointed by President Carter in December 1979 to be the first Director of this Office, which was established at title IV of the Ethics in Government Act of 1978, Public Law 95–521, as amended, and having continued to serve in that position as a member of President Reagan's administration until September 1982, when I became President of the National Academy of Public Administration, I am pleased to have the opportunity to share with you my thoughts on the first few years of operations with this new Office.

In these days when the overriding national issues involved the health of our economy, it would be easy to dismiss a concern for governmental ethics laws as, at best, an unaffordable luxury. But efforts to cure our economic ills raise the broader underlying issue of how our democratic government can insure a climate of trust in which the difficult political implications of our economic predicaments can be addressed properly.

To a great extent, the economic questions we face require political answers. And those political answers will, in many instances, require exceptional candor by our leaders and personal sacrifices by the American people.

Without a sufficient measure of public confidence in government, it will be difficult to inspire public responsiveness to such candor and public acceptance of such sacrifices.

To solve our economic problems, the important work of our democracy must be conducted in an atmosphere in which the people have confidence that those in positions of power within the Government are fair, honor the public interest as paramount, and are committed to keeping the public trust.

There is no single way to create such an atmosphere of confidence. But whatever else it may take to inspire the confidence we need, surely an indispensable prerequisite is an ethical framework for government. For how the people view public officials, how they perceive their priorities, and how they discern their values is intimately and inevitably related to governmental ethics. Ethics laws

alone obviously are not and will not be enough. But they are essential.

You have before you, in S. 461, a proposal to extend the authorization for appropriations of the Office of Government Ethics, an Office that is a success.

To be sure, my testimony on this point may not be wholly disinterested, but I must say that by almost any standard of measurement, the Office of Government Ethics must be rated a success and should have its authorization for appropriations extended.

In particular, Mr. Chairman, let me mention the very high level of morale, of professionalism, and of productivity by the career staff of this Office that was evident throughout my tenure as Director and in testimony here this morning. Senators, the American people got their money's worth from these civil servants.

On the other hand, the Ethics in Government Act is not a perfect law. I endorse the seven amendments submitted last June by the Office of Government Ethics as those amendments were proposed in a paper prepared for the Office's third annual conference by David R. Scott, then the General Counsel and now the Office's Acting Director.[1]

I was able to lure Mr. Scott away from the Department of Justice, where he was serving as the senior trial attorney in the Public Integrity Section of the Criminal Division, to be our General Counsel. He has done a consistently outstanding job. I am pleased to associate myself with his personal testimony. I relied heavily on his advice and legal judgment.

In particular, let me single out the recommendation to provide for the special problems of Presidential transition periods.

The issues are twofold:

First, how to proceed with the review of financial disclosure reports of intended nominees of a President-elect—the intended nominees of a President-elect, the President not yet being confirmed, when the act authorizes the Office to review only the financial disclosure reports of a confirmed President's formal nominees.

And second, the question of how to handle public release of these reports when the act's triggering clauses is for a sworn-in President. In the crunch of a Presidential transition, these questions can be difficult to resolve.

We worked out what we thought were reasonable approaches, and I would simply commend to the Senate the proposal to adopt these transition issues in the statute.

To explain the institutional status of the Office of Government Ethics, the "bureaucratic order of things" if you will, it is necessary, first, to point out the locus of responsibility for insuring the integrity of Federal executive officers and employees. To a first order, this responsibility is the President's. The Constitution directs the President to establish and maintain proper standards of personal conduct and integrity for Government officials. The original understanding of the framers of the constitutional requirement that the President "take care that the laws be faithfully executed" would be compatible with today's ethics-in-Government program.

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[1] See p. 146.

To a second order, the regulations of the Office of Government Ethics provide as follows:

> The head of each agency is responsible for and shall exercise personal leadership in establishing, maintaining and carrying out the agency's ethics program. He or she shall make available to the ethics program sufficient resources (including the assignment of investigative, audit, legal and administrative staff as necessary) to enable the agency to administer its program in a positive and effective manner. [5 C.F.R. 738.202(a)]

This arrangement results, as I believe very strongly that it should, in a decentralized ethics program with substantial authority vested in agency heads and their designated agency ethics officials.

The Office of Government Ethics operates, in this scheme, as a law firm and consulting firm for the agencies and departments regarding the issues that come within the Office's jurisdiction.

As Mr. Scott's testimony demonstrates and as the General Accounting Office made clear, this scheme has succeeded. Congress established a sound basic structure, and it does work.

Not in all cases, to be sure, was I completely sanguine about the specific decisions reached by agency personnel, but I am persuaded that the fundamental decentralized set up of the Federal executive ethics-in-Goverment program represents the principled implementation of a regulatory statute in a competent and reasonable manner. It works, Senators, and that is a considerable achievement.

Let me add that a very great deal of good work went into fashioning the structure of the Office of Government Ethics and the Federal executive ethics program. The singular contribution came 22 years ago from the association of the bar of the city of New York, whose 1960 book, "Conflict of Interest and the Public Service," was the best guide I found on many of the troubling matters of first impression that came to my attention.

Roswell Perkins, a partner at Debevoise & Plimpton and a Federal executive during the Eisenhower administration, chaired the bar association's task force. Mr. Perkins spoke to the third annual conference of the Office of Government Ethics in June 1982 and analyzed the Ethics in Government Act in a setting that was designed expressly in anticipation of the hearings of this Senate subcommittee.

It is his view that establishment of the Office of Government Ethics was the most important feature of the act. He cited five key elements of its functions:

First, the preparation of regulations for the purpose of aiding compliance by clarifying difficult statutory provisions.

Second, enforcement. I would single out there especially the prospective enforcement of the criminal conflict-of-interest statutes by means of analysis of financial disclosure reports.

Third, prevention, particularly by educational efforts.

Fourth, the rendering of publicly available advisory opinions.

And fifth, the evaluation of the entire effort, as, in this case, in the annual conferences, the proposed amendments by the Office, and also a June 1980 program evaluation plan that we actually published 3 years ago.

A final issue that I would like to address concerns the relationship between the Ethics in Government Act and Presidential recruiting.

As the President of the National Academy of Public Administration, I am supervising a major study, which the Business Roundtable is underwriting, of the processes and practices involved in Presidential recruiting. The final comment draft of this study will not be available until mid-April, when I will deliver a copy to this subcommittee.

At the present time, however, I certainly am free to share several of the easier recommendations we will be making:

The expedited procedure adopted by the Office of Government Ethics for reviewing the financial disclosure reports of individuals appointed by the President and subject to confirmation by the Senate (5 CFR 734.604(c)), goes some distance toward smoothing out a procedure that must be improved constantly to eliminate paperwork duplication by the prospective nominees, to achieve the maximum consensus on the substantive conflict-of-interest standards to be applicable to them, and to arrange for the minimum possible time delay attributable to the review of the reports.

The Assistant to the President for Presidential Personnel and his staff of recruiters should learn the details of these issues and communicate them earlier and more accurately to prospective nominees in order to alleviate the briefing workload of the counsel to the President—the first part that is being financed by the Business Roundtable.

In view of the widespread misunderstandings concerning the restrictions in these statutes, steps should be taken by the White House and by the Office of Government Ethics to educate the public generally and to inform prospective appointees in specific terms. There is considerable confusion, even among well-informed individuals, about what these laws require and about the distinction between what the Ethics in Government Act requires and what the conflict-of-interest laws require. Misinformation and exaggeration have misled some potential candidates about the procedural burdens and substantive requirements of these laws and may have discouraged possible acceptance of Federal positions.

Very simply, the data just do not exist to document adequately the relationship between Presidential recruiting, the conflict-of-interest laws, and the Ethics in Government Act. Each situation is unique. My own personal judgment is that the benefits to our Nation, to a President's appointees, and to the President himself, far outweigh the costs.

Holding the leaders of the executive departments publicly accountable to high standards of personal financial integrity must be a starting point for any Presidential program for governing this country.

Senators, let's be clear that the avoidance of violations of criminal conflict-of-interest laws hardly constitutes a significant measure of ethical achievement. But we must never stray from the basic understanding that in this democracy of ours, despite what some may think, a public office does not belong to the individual who may happen to occupy it at any given time. A public official in America is merely a temporary caretaker. Public office is a public

trust, a privilege, a responsibility, a stewardship for which the officeholder must expect to be held accountable by the sovereign people.

I do endorse the 5-year reauthorization for appropriations for the Office of Government Ethics, as proposed in S. 461. I think the achievement record for the Office justifies this endorsement, and we are here today in part to celebrate its success. I would be happy to answer any questions you may have.

Senator LEVIN. Thank you, Mr. Walter. First let me tell you that I have heard good things about your term of office. It was a period of time which was, indeed, an important one, and from the reports I have received, you purported yourself well. Do you agree the head of this Office should not be removable at will by the President, only for just cause?

Mr. WALTER. I would answer in two ways, Senator Levin. First of all, as a matter of my own personal experience as the Director of this Office for the first 3 years of its life, I never had—personally never had the kinds of difficulties to which you have been alluding in various ways earlier this morning.

My relationships with the White House in both administrations, with the Office of Personnel Management, and with the Office of Management and Budget, over the last 3 years have been singularly comfortable.

I personally never was in the circumstances that you foresee. On the other hand, I think from the point of view of revising the statute, the suggestion of a term of office is entirely appropriate. I would endorse it.

Senator LEVIN. Why?

Mr. WALTER. I would have a long list, starting with the notion of the symbolic importance of the independence of the Office.

I would like to point out that no sort of structural reform that you can make by adopting a term of office for the Director guarantees independence. There are too many other ways that independence can be checked. We talked about them earlier today.

But I think the emphasis on—the symbolic emphasis on the independence of this Office and the judgments that the Director comes to and is charged by statute to come to—I think it would be well for endorsing, clarifying, and emphasizing.

We have now lived with this Office for 3 years. It seems to me that the notion of adopting a term, while a symbolic one, would nonetheless indicate the sentiment of Congress that this Office is performing a valuable service in the Government of our country. And that you endorse the way implementation of this act has been approached.

It would seem to me that would be the way I would read that term suggestion.

Senator LEVIN. I would like you to enumerate a few of the other ones.

Mr. WALTER. I haven't really thought about it at any great long length, other than to think that it is probably a pretty good idea; it is called for; it is symbolically necessary.

With the office still part of the Office of Personnel Management or independent of OPM, those kinds of structural questions would seem, in my mind, to cut, in terms of operating an entity within

the executive branch, at least as importantly as the question of simply placing a term on the Director, but leaving everything else unchanged.

Until we've spelled out what the everything else was, I'm not sure that my set of reasons about a term by itself are particularly persuasive.

Senator LEVIN. Would you recommend that it be separate from the Office of Personnel Management?

Mr. WALTER. The only relationship that exists presently and over the 3 years that I had anything to do with this Office, went to questions of administrative support: The level of administrative support that the Office would receive from the Office of Personnel Management.

I was always able to work those problems out reasonably amicably, so what is to be gained, again, I think would be a recognition, largely symbolic, because certainly there is no guarantee that simply creating a new independent office will pave the way for a perfect appropriations process, in every case.

It would be a symbolic recognition of the independence and permanence of the Office, and I think there would be some merit in that, yes.

Senator LEVIN. I yield back.

Senator COHEN. How long were you there as the Director?

Mr. WALTER. I was confirmed in December 1979, Mr. Chairman, and served through September 1982.

Senator COHEN. Were there any times that you ever differed with the White House legal counsel in terms of your interpretation of the rules and regulations and statutes?

Mr. WALTER. I guess lawyers always disagree on the implications of statutes, and certainly we would probably differ on how we would interpret the implications of the laws, but I think at no time did I ever find myself in disagreement on the resolution of the problem, which is probably the more important concern.

In that sense, I think I was at all times on all fours with both sets of counsel that I served with.

Senator COHEN. You felt satisfied that after presenting your legal interpretation, and the White House legal counsel coming in and saying that we disagree on that, that you worked out your differences?

Mr. WALTER. We did.

Senator COHEN. To your satisfaction?

Mr. WALTER. To my satisfaction The resolution of every problem I had to deal with with the White House was worked out to my satisfaction completely; yes, sir.

Senator COHEN. Did you ever find that there was a potential or an actuality of a sort of forum shopping. For example, did the White House, anticipating that someone like yourself or Mr. Scott was going to give a fairly tough interpretation of a conflict-of-interest statute, ever say: "We better get this to the Justice Department first, and perhaps get a Justice Department ruling,"—and that kind of puts the squeeze on you or does an end run around you?

Mr. WALTER. I would respond in a couple of ways. First of all, early in 1980, the Office of Government Ethics and the Department of Justice's Criminal Division entered into a formal memorandum

of agreement by which the Office of Government Ethics was expressly authorized to render advisory opinions, prospective opinions on interpretations of the criminal conflict-of-interest statutes.

In the time that I was there, I made very substantial efforts, starting with hiring Mr. Scott, who was, after all, working in the Department of Justice when I hired him.

And subsequently arranging for the services of the then retiring senior official in the Office of Legal Counsel at the Department of Justice to serve as a consultant to my office.

I worked very, very hard to create and maintain close working relationships between the Office of Government Ethics and the Office of Legal Counsel in the Justice Department. Precisely to head off any forum shopping.

So far as I know, during the time that I was there, someone may have made an effort to do so but it never worked because a problem never came into one office that the other did not know about by the end of the day. And that worked both ways.

For all I know, some people may have tried some forum shopping to avoid the Justice Department by coming to us. But no one ever got anyplace because we worked too hard to make sure they wouldn't.

Senator COHEN. Do you think the OGE should have more investigatory or audit powers than it presently has?

Mr. WALTER. One of the tales I love to think about this office: In October 1978, the Congress passed the inspector general law, the Ethics Act, and the Civil Service Reform Act.

They came out of the same committee in the same month. And there is no cross-reference between them. So there is no statement in the statutes or in the legislative history about what the relationship might be between the Ethics Office and the Inspectors General.

It seems to me that the way I would respond to your question would be to suggest the best resolution would be to authorize a director of the Office of Government Ethics to be able to call upon the resources of the Inspectors General in the several departments, and conversely, to direct the Inspectors General to honor the requests by the Director of the Office of Government Ethics.

So that the resources which are already in place, already funded, and which already exist, would be put at the disposal of the Office of Government Ethics, rather than expanding its staff and increasing its powers. I don't think that is called for. I think the other way is a better solution.

Senator COHEN. Has there been a problem of calling on the resources of the IG's?

Mr. WALTER. I was a member of the President's Council on Integrity and Efficiency in this administration, and its predecessor in the Carter administration, and I worked closely with the Inspectors General.

I saw that persuasion was a successful approach. On the other hand, I would have felt considerably more comfortable if my authority to do that had been spelled out even in the committee report.

There simply was no recognition in the legislative history of the IG statutes that they would ever have anything to do with the

Office of Government Ethics or with ethics or with conflict-of-interest issues. And I think some recognition is called for.

Senator COHEN. What happens now, for example, if the Director of OGE reaches a judgment that something ought to be put into a blind trust? Did you ever follow up on that, to determine whether it is truly blind or only half blind?

Mr. WALTER. As to the question of following up on the undertakings of Presidential appointees, specifically blind trusts, obviously the first responsibility is that of the Presidential appointee. And in large measure, I would be prepared to testify and to support the comment that their record generally has been very good.

The second order of responsibility is of the agency ethics official, who is notified in some detail about the nature of the undertakings by each Presidential appointee in that department; and is directed to follow up on them.

And there have been specific, what we call OGE-grams, Directors letters to the agency officials, directing them to follow up in some detail on the undertaking.

And that is the second order of followup.

And then third, as Mr. Scott testified this morning, the Office of Government Ethics' monitoring and compliance unit does expressly follow up on the undertakings.

And finally, and in particular, in the question of blind trusts, the office did, in November 1981, have a conference for all of the then trustees of all of the blind trusts created across the Government.

There were some 25 or 30, I suppose. And those trustees gathered for a good, solid morning's work on what are your obligations and what is the nature of this status that you have agreed to?

The sanctions in the statutes with respect to the violation of the blindness of the trust are very considerable. And the office works rather closely with the trustees, once named, to see to it that they understand what it is that they have taken on, in an educational sense. And the nature of the exposure that they have to sanction.

I was fairly satisfied that in general, we did a good job, but specifically, my memory is getting a little hazy about the details of particular trusts, Mr. Chairman. I do not have any recollection.

Senator COHEN. Let me ask one final point. I recall that during the transition period when the Reagan administration first came into power, there was a considerable period of delay in filling the top slots. I also know that E. Pendleton James commented that the conflict-of-interest statutes, the disclosure, and the revolving door restrictions served to impede or deter very qualified people from coming into Government service.

What is your reaction to those comments?

Mr. WALTER. I'm glad you asked that question.

Senator COHEN. It is a softball.

Mr. WALTER. First of all, let me say that when we deliver to you the study by the National Academy on the question of Presidential recruiting, we will, I think, have some fairly precise judgments in response to that.

Mr. James, as you know, summarized his views in an article that he wrote in Business Week last summer.[1] I've had the privilege of

[1] See p. 153.

talking with him about some of the things that he said in that article, and have tried to educate myself since I did not recognize some of the statements that he has made as having much to do with this same law that I was administering.

And I thought perhaps I might enlighten myself. He, as you know, quibbled a bit with what he called the divestiture requirements of the Ethics Act. I pointed out to Mr. James that there are no divestiture requirements in the Ethics Act; and that apparently came as news to him.

This same sort of exchange was on several fronts. As people here well know who participated in the third OGE conference last June, Mr. James expressed somewhat to my astonishment, at least, that he first heard of the Ethics in Government Act, having rehearsed in some detail the history of setting up the transition office for the Reagan administration, starting 6 months before the election.

He said he first heard of the existence of the Ethics in Government Act 8 weeks after the election. It seems to me unlikely—wrong. That was an astonishing admission.

I don't think there is any evidence that suggest that the Ethics in Government Act in any way impeded the processing of nominees. The statistics are pretty solid on that, that the turnaround time of processing was prompt.

But I have no doubt in my mind at all that there probably are some cases in which somebody did not want to accept a Federal job because he did not want to fill out a financial disclosure form, or some other problem.

Or that there was a conflict of interest issue, and the cures were clearly spelled out; and the person did not wish to take the cure.

There are not very many data about that. Obviously, it is not something that you talk about very much. Those people who do not accept the President's offer of a job, it is not something that gets a lot of publicity.

And I personally was not privy to those negotiations at all. Certainly it is the case that so far as I know, in no situation was an intended nominee ever announced and then forced to pull back on account of the conflict or the Ethics Act.

I would say probably in some cases, in very few cases, there certainly would have been a direct deterrent effect. But it probably was not really very substantial.

And I would think about the benefits attributable to this process to the Nation, to the appointees, and to the President, far outweigh the rather minor costs.

Senator COHEN. Thank you very much, Mr. Walter. That's all I have.

Senator LEVIN. Thank you, Mr. Walter. You have talked about the importance of having a head of the agency being independent as being symbolic. You used that word a number of times.

Isn't there more than just symbolism, as important as that is, and the appearance issue? Isn't there also a real problem for many people in having to judge the ethics of actions of people who decide whether they keep their jobs?

Mr. WALTER. Senator Levin, what I believe I testified was that that has been my experience. I did not have that problem.

So rather than wonder hypothetically about whether some other director of the Office of Government Ethics might, under some other set of circumstances, face that problem; I chose to say that it seems to me that as a symbolic matter, it is clear.

I can easily imagine cases in which it would be very important, really, but I did not ever face that issue of my own personal experience.

I've had no witness to it.

Senator LEVIN. It is important for more than symbolic reasons that we not put people in that spot?

Mr. WALTER. Yes.

You asked me if I had additional reasons. I said I had not thought of them.

Senator LEVIN. Now that you have had all this additional time to think about it, you would agree that we should not put people in that position, I presume, for very practical reasons?

Mr. WALTER. For very practical reasons.

Senator LEVIN. As well as symbolic.

I'm curious as to the process of negotiating these settlements. I am interested in the process of negotiating these blind trusts or screening arrangements, whatever you finally end up with. Are these negotiated, basically?

Take the case—a screening arrangement—instead of the blind trust, which apparently was rather typical for someone with extensive kinds of holdings. The CIA's Director was allowed to have a screening process at the CIA, which you approved.

Was that something which was negotiated between you and the CIA? Was it something which they initiated? You initiated? How did that work?

I am just using that as an example of the process.

Mr. WALTER. In responding to your question, Senator Levin, I think I would like to respond in a hypothetical or generalized sense, and not in any way chose to represent that what I am going to say has anything to do at all with the manner in which what you referred to as negotiations with Director Casey's representatives proceeded. I think it would not advance the record very far to talk about the details.

Senator LEVIN. Is that privileged in some way?

Mr. WALTER. It seems to me that the general procedure is perfectly representative, and the practice was relatively consistent across a variety of cases.

Senator LEVIN. There are many instances where we provide for screening, even though there are extensive stockholdings, such as that.

Mr. WALTER. Let me point out that the language in the statute, in the Ethics in Government Act, which, for the first time established a statutory basis for the creation of blind trusts, does not have any policy statements associated with it at all. It simply is permissive if an appointee wishes to—and then there is a series of—I suppose you might say optional cures for prospective problems. And a blind trust—or one of the two kinds of blind trusts is one of several varieties of potential cures.

Senator LEVIN. The question is: Was that typical—where there was extensive stockholdings? Was the screening process a typical one?

Mr. WALTER. There are and have been people in Senate-confirmed positions with extensive stockholdings without a blind trust.

It seems to me, first of all, that given the possibility of proceeding under any of the other cures, I would never encourage anybody to get involved in a blind trust who did not have to. It is a very cumbersome device.

Senator LEVIN. I wonder if I could just ask my question again. Was the screening solution that was finally adopted relative to Casey a typical solution for somebody who had extensive stockholdings? That's my question.

Mr. WALTER. Senator Levin, I cannot really recall the full details of the nature of the screening device.

The recusal—the agreement to recuse certainly is typical; yes, sir.

Now, the details—I'm sorry. I really have not tried to go and refresh my recollection about the details of how the CIA and Director Casey agreed and screened and computerized, and this and that. I just do not—I just have not gone and tried to get current.

Senator LEVIN. I press it because you said you wanted to talk in the abstract, not about particular cases. And the reason you gave for that was it was rather typical—the Casey solution.

My question to you is, then—which I would like to repeat, then—is whether or not, in fact, the use of that screening process for somebody in that type of position, where there are extensive stockholdings, was typical?

Mr. WALTER. Similar screening processes are typical.

Senator LEVIN. With extensive stockholdings?

Mr. WALTER. I don't want to misrepresent or have a difference of opinion between us as to what constitutes "extensive."

Senator LEVIN. Is it your opinion that it is typical where there are extensive stockholdings?

Mr. WALTER. It is not atypical.

Senator COHEN. Is this one of those negotiated agreements over the phone that we talked about, with differences of interpretation taking place right now?

Mr. WALTER. Yes, Mr. Chairman, I think that is exactly right.

Senator LEVIN. Thank you.

I did not want to interrupt you. I think I interrupted your answer.

Mr. WALTER. No.

I agreed that—yes.

Senator LEVIN. You said "atypical"?

Mr. WALTER. "Not atypical."

Senator LEVIN. There were negotiations over the phone? Is that what I understand your answer to the chairman to be?

Senator COHEN. I was being a bit facetious, Senator Levin. I was talking about how two lawyers may differ in their interpretation and try to work out some sort of an agreed understanding that seems to be taking place right now.

Senator LEVIN. Regardless of the details of that, was that negotiated between you and the CIA ethics officer?

Mr. WALTER. And the staff of Government Ethics.

Senator LEVIN. It was a negotiated settlement—resolution?

Mr. WALTER. I prefer "resolution."

Senator LEVIN. Was there supposed to be monitoring of that agreement? Typically, would there be monitoring?

Mr. WALTER. Yes.

The Office of Government Ethics, in a letter addressed to all agencies' ethics officials, makes it very clear that recusal agreements, if we can call them that—recusal agreements are to be monitored.

Senator LEVIN. By?

Mr. WALTER. In the first instance, by the agency ethics officials.

Senator LEVIN. And then by the OGE?

Mr. WALTER. Subsequently. That is correct.

Senator LEVIN. So, we can assume there will be monitoring of that, like any other agreement, by the OGE to see how many matters were screened out from the Director and how many where there were recusals?

Mr. WALTER. I am not sure that the monitoring of a recusal agreement will manifest itself in some statistical table. But there certainly will be a followup to see that the agreement is in place, that appropriate directives have been sent to various departments to indicate to people who control the paper flow and the decision flow to an incumbent that those people are clearly on notice as to the nature of the holdings and what they are to do when a decision involving the holdings comes; yes, sir.

Senator LEVIN. Let me go through the process.

There was some kind of discussions about what would be an appropriate resolution to the stockholdings of Mr. Casey.

How did the solution or how would that solution, in the abstract, putting aside the Casey matter, solve the problem of inside information?

I can see where, arguably, it could solve the problem of conflict of interest in the sense that you presumably can—at least theoretically—avoid him having to decide an issue where he has a financial interest by just removing it from him, and he can recuse himself.

But in terms of him having information which would help him buy or sell stocks—or anybody else—forget Casey, anybody else—how do we get around the inside information issue if we don't have a blind trust?

Mr. WALTER. That is using information that came to you in the conduct of your official responsibility——

Senator LEVIN. To sell or purchase stocks?

Mr. WALTER. I suspect without really wanting to give you a valueless legal opinion, you can pretty quickly get involved in a conflict violation there, Senator.

Senator LEVIN. My question is how do you know what information gets to Casey which affects the purchase or sale?

Mr. WALTER. I think the answer to that goes as much, Senator, to the responsibilities of the agency ethics official, at least in our scheme of things, as to the Director of the Office of Government Ethics.

The detailed information flow within a department or agency, given the range of procedures in the executive branch of the Government, it seems to me cannot possibly be charged in every instance to one very small office.

And to monitor that is precisely the kind of reason that we attempted to adopt a decentralized program, forcing back on the Department and agencies the responsibility to control that kind of information.

Whether that works——

Senator LEVIN. It does not seem to me a screening process has any control over the inside information issue.

Mr. WALTER. It is possible you are correct, Senator.

Senator LEVIN. The question was: If you don't have a blind trust, what kind of protection do you have? Take it out of the CIA, for a moment. How about the Secretary of the Treasury, in terms of insider information? If somebody who has large stockholdings becomes Secretary of the Treasury, is that one of the more clear cut cases? You do not have to go through the sophisticated analysis? You say, right up front, that that is an impossible situation for a Secretary to have stocks without having direct access, to inside information. In the case of the Director of the CIA, you can make that case as well, because certainly anyone that has a daily flow of information concerning world events would be in a position to make some rather wise decisions on his investment policies.

Doesn't it depend upon the nature of the office?

Mr. WALTER. Indeed.

Senator LEVIN. But you said before that you would recommend against a blind trust. If it is the only other way to go, then you would recommend a blind trust. Shouldn't it be the rule, rather than the exception, when you are dealing with top officials?

Mr. WALTER. I think—I strongly believe that it should and, furthermore, have taken the position and have stated publicly—and fairly directly, I think—that it seems to me that each administration coming into office ought, as a matter of administration policy, sketch out or lay out what that administration's policy, as a policy from—directly from the President, with respect to adopting to blind trusts in certain positions ought to be.

And it seems to me that that approach, rather than trying to write that policy into statute, which is necessarily going to tie your feet together in one way or another, an unintended consequences kind of problem, that the White House should lay out a policy at the front end on blind trusts—at the moment, that does not exist.

We have recommended that that be a good approach. So far, we have not gotten very far with the recommendation, but we have certainly recommended it.

Senator LEVIN. I take it the Secretary of the Treasury does have a blind trust?

Mr. WALTER. That is correct.

Senator LEVIN. I know that you felt that the solution in the Casey matter was an acceptable one. You agreed to it. Would you have preferred a blind trust in that instance?

Mr. WALTER. Happily, at the time, I did not have to face it. And I guess I would try to duck it again today, Senator, if I could.

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The question I had to face was: Is this arrangement acceptable in terms of the statute? And it was.

Senator LEVIN. You did not recommend a blind trust?

Mr. WALTER. No, I did not.

Senator LEVIN. You felt your role was to just rule on whether or not what came to you was acceptable, not what would be preferable?

Mr. WALTER. Yes.

Senator LEVIN. Isn't that a rather limited role for a Director of the agency if he thinks that there is a preferable solution, even though the one that is proposed to him might be adequate?

Mr. WALTER. Yes; I think, within reason, it probably is a fairly limited view.

I think the goal of the Office, as it is directed, is to achieve compliance. That is the statutory direction to the Director, to achieve compliance with the conflict statutes. It does not go further than that. It—the proposal that came to the Office achieved compliance with the conflict statutes. And that is what we were asked to rule upon in a narrow way.

We did; and were satisfied that it would achieve compliance.

I would be inclined to make the same decision today if I were asked.

On the other hand, if there were some administration policy directing somebody to aim for a different goal, then it seems to me that that would substantially change the base that you are operating on.

But when you are interpreting a statute in which you are directed very precisely, as in this case, to achieve compliance with the conflict-of-interest statutes, then it seems to me that it is the proper conclusion to come to. And I believe that was what we did. I was satisfied and still am.

Senator LEVIN. Doesn't the use of a screening mechanism, where there are extensive stockholdings which might require large numbers of recusals, violate the standard which you, yourself, have written about—screening agreements should not be used where there are significant stockholdings, where a number of recusals might be required?

Mr. WALTER. It was the judgment of the General Counsel of the CIA and of the agency ethics official at the CIA that extensive recusals and disqualifications would not, in fact, be required. It was a question which we asked rather directly.

And not being in any way involved in my career with the internal workings of what the director of that particular agency does—or, for that matter, the Secretary of most of the Cabinet departments—it seems to me if it is represented to me that extensive disqualifications will not, in a certain circumstance, be called for, I am going to take that judgment and rely upon it.

Senator LEVIN. What we then would have left would be the inside information issue?

Mr. WALTER. As you have posed it, yes, sir.

Senator LEVIN. How do we solve that problem of the inside information problem with agency directors—forget Casey, any agency Director who receives vast amounts of information which could

affect the value of his stocks? How do we get around that problem without a blind trust?

Mr. WALTER. I suppose the first and most obvious thing to do, which I think was part of the case that you have been asking about is to—and I'm sorry, I cannot speak to the details, and you have got detailed recollection on that screening arrangement, but the most obvious thing to do would be to have the person not exercise individual buy-sell agreements.

Senator LEVIN. Buy-sell decisions.

Mr. WALTER. Yes; simply relinquish, even absent the institution of a trust mechanism and turn over to some other person the management of the assets, simply relinquish any buy-sell agreements, and you are frozen in what you own.

Senator COHEN. Could you hold for a minute? In other words, you are saying that he should freeze exactly what his portfolio is at that time?

Mr. WALTER. Senator, I have not worked recently through the details of that decision, but in answer to Senator Levin's question about, aren't we left with the inside information issue, and how do we do that, I was responding in general to say that the most obvious thing is somehow to get out of the official's conduct the individualized buy-sell agreements. That would cut it off. How to translate that into some kind of formal agreement is the question at the moment.

Senator COHEN. Does that mean to say get out of buy-sell agreements? I don't understand that. What does it mean?

Senator LEVIN. Having someone else make the decision on buy or sell?

Mr. WALTER. I would think that. That is the most obvious thing, and that probably translates into a trust, Mr. Chairman.

Senator COHEN. If you're going to have somebody else appointed to make the decision, it still does not deal with the flow of information or insider information. You could call such-and-such a person to act as your agent, and they will buy and sell.

Mr. WALTER. Of course.

Senator COHEN. Or if it means no more buy-sell agreements, then it means that you freeze in place those assets of that individual for the length of his service.

It occurred to me that even freezing in place is not a total answer. It might come to your attention that the long-term aspects of this stock are very good. Therefore, you decide to hold on to it and not sell.

Mr. WALTER. The "don't sell" circumstances are sometimes as important as the sell or the buy, I agree.

Senator LEVIN. Do you believe this screening arrangement with Mr. Casey should have addressed the inside information issue? Whether or not it did is a matter of going back and looking at the agreement.

Do you think that it should have?

Mr. WALTER. First of all, if I start to answer that question hypothetically, I am going to have to assume that it didn't, and I can't remember whether it did or not.

From a screening—whether or not a screening arrangement should deal with the inside information issue, the Executive order

does, of course, speak—that is the LBJ order that the chairman spoke about, does talk about dealing with inside information. So fashioning an appropriate kind of screening device in certain circumstances might be an appropriate thing to do.

Senator LEVIN. The kinds of issues that we talked about are not intended to use the Casey illustration, other than as an example. It is a complex problem which a Director has to face, and the importance, it seems to me, of that Director being free from the constraints of having his or her job on the line. It is not intended for anything other than that.

I think it is a good example. We can extract a bit from it. And I think for many people, in fact, it is a lot healthier to remove this Director, whoever he or she is, from the direct influence by discharge from the White House.

Yesterday, we saw an Inspector General discharged. Immediately, the question was raised, not by me, by some, as to whether or not that Inspector General was discharged because of a report that had been recently filed. I don't have the vaguest idea as to whether or not that Inspector General was discharged for that reason.

All I know is that immediately there is an appearance that can be created, real or not. It seems to me if we're going to vest the office with that kind of judgment, then we have got to make sure that the office can live up to it, in fact, in appearance.

And again, I thank you for your testimony and for your service, by the way, as Director of that office, and the only reason that I like to get into the specifics is that I think they help illustrate some of the complexities and some of the importance of this Director having as much independence as is possible.

Senator COHEN. I would just add one final postscript to all of this, Mr. Walter.

Senator Levin and I have been rather active in the past year dealing with Special Prosecutor legislation for the very same reason. Initially, and I think, ultimately, the Justice Department still resisted the notion that we should have a Special Prosecutor, because they felt that it somehow undermined the integrity of the Justice Department itself. In fact, we were trying to persuade the Department that the appearance is as important, if not more important many times, than the substance. To the extent you have the Justice Department with an Attorney General, who is a political appointee, making decisions or rendering judgments upon other members of the President's family, his political family, and such, the appearance is terribly important, and we had case after case that we could illustrate.

Most recently, in the Raymond Donovan case, the use and the employment of the Special Prosecutor worked to the great advantage of Mr. Donovan and to the administration. In fact, had the Justice Department come to the same conclusion that there was not sufficient evidence to warrant further investigation, it would not have been accepted. It would have the same sort of appearance that Senator Levin has mentioned with respect to the firing of an IG. So we have to place a lot of importance on the appearance of independence, the appearance of these separate judgments being rendered.

We thank you for your very forthcoming testimony.

Mr. WALTER. Thank you.
[Mr. Walter's prepared statement, with attachment, follows:]

STATEMENT OF

J. JACKSON WALTER

PRESIDENT,
NATIONAL ACADEMY OF PUBLIC ADMINISTRATION
AND
FORMER DIRECTOR,
OFFICE OF GOVERNMENT ETHICS

BEFORE

THE SUBCOMMITTEE ON OVERSIGHT OF
GOVERNMENT MANAGEMENT

OF

THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS

ON
S.461

TO EXTEND THE AUTHORIZATION OF APPROPRIATIONS FOR THE
OFFICE OF GOVERNMENT ETHICS FOR FIVE YEARS

FEBRUARY 24, 1983

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Thank you for inviting me to appear before this Subcommittee to testify on the five year reauthorization of appropriations for the Office of Government Ethics as proposed in S.461, which I endorse. Even better would be a permanent reauthorization, which I believe the record fully justifies.

Having been confirmed by the Senate and appointed by President Carter in December 1979 to be the first Director of this Office, which was established at Title IV of the Ethics in Government Act of 1978, Pub.L. 95-521, as amended, and having continued to serve in that position as a member of President Reagan's Administration until September 1982 when I became President of the National Academy of Public Administration, I am pleased to have the opportunity to share with you my thoughts on the first few years of operations with this new Office.

In these days when the overriding national issues involve the health of our economy, it would be easy to dismiss a concern for governmental ethics laws as at best an unaffordable luxury. But efforts to cure our economic ills raise the broader underlying issue of how our democratic government can ensure a climate of trust in which the difficult political implications of our economic predicaments can be addressed properly.

To a great extent, the economic questions we face require political answers. And those political answers will, in many instances, require exceptional candor by our leaders and personal sacrifices by the American people. Without a sufficient measure of public confidence in government, it will be difficult to inspire public responsiveness to such candor and public acceptance of such sacrifices.

To solve our economic problems, the important work of our democracy must be conducted in an atmosphere in which the people have confidence that those in positions of power within the government are fair, honor the public interest as paramount, and are committed to keeping the public trust.

There is no single or simple way to create such an atmosphere of confidence. But whatever else it may take to inspire the confidence we need, surely an indispensable prerequisite is an ethical framework for government. For how the people view public officials, how they perceive their priorities, and how they discern their values is intimately and invevitably related to governmental ethics. Ethics laws alone obviously are not and will not be enough. But they are essential.

You have before you in S.461 a proposal to extend the authorization for appropriations of the Office of Government Ethics, an Office that is a success. To be sure, my testimony on this point may not be wholly disinterested but I must say that by almost any standard of measurement the Office of Government Ethics must be rated a success and should have its authorization for appropriations extended.

In particular, Mr. Chairman, let me mention the very high level of morale, of professionalism and of productivity by the career staff of this Office that was evident throughout my tenure as Director. Senators, the American people got their money's worth from these civil servants.

On the other hand, the Ethics in Government Act is not a perfect law. I endorse the seven amendments submitted last June by the Office of Government Ethics as those amendments were proposed in a paper prepared for the Office's 3rd Annual Conference by David R. Scott, then the general counsel and now the Office's Acting Director. I was able to lure Mr. Scott away from the Department of Justice, where he was serving as the senior trial attorney in the Public Integrity Sector of the Criminal Division, to be our general counsel. He has done a consistently outstanding job.

In particular, let me single out the recommendation to provide for the special problems of Presidential Transition periods by quoting liberally from Mr. Scott's above-referenced paper:

> Provide for the special problems of Presidential Transition periods. Stated in the most stark way, the Act provides absolutely no guidance as to the special problems encountered in that interim period between a general election and the assumption of power of a new President—the so-called Presidential Transition period. Two examples of problems that have been encountered because of this deficiency will suffice: (1) The Act presupposes a President to send nominations to the Senate to trigger the applicable agency's and OGE's reviews of public disclosure reports for conflict of interest purposes. In a Presidential Transition period (from roughly the first week of November until the following January 20th), the President-Elect, of course, has no power to make nominations and hence, literally speaking, neither the agencies nor OGE are entitled to review or even be informed of his proposed candidates who will need Senate confirmation after he takes power. If that practice had been followed with the Reagan Administration, the bottleneck created by the Ethics in

> Government Act in preventing the Cabinet from being speedily confirmed would have been colossal. Instead, OGE invented a solution with the help of the Reagan Transition Team whereby the President-Elect's notice of "intent to nominate" in advance of January 20, 1981 was treated as tantamount to a nomination. The applicable agency and OGE then proceeded to review and to resolve "intended" candidates' conflict problems well before January 20th so that the Senate was able to have OGE's opinion letter on that subject in hand well before the candidates could be confirmed. While the bottleneck was thereby averted, OGE suggests that the Act be amended to formalize this ad hoc solution. (2) Public release of disclosure reports is predicated on their "receipt" by the applicable agency and by OGE. Section 205 (b)(1) of the Act. In a Presidential Transition period, if the agency receives an "intended" candidate's signed disclosure report from the President-Elect, must the agency make that report publicly available within the normal 15 days even though no actual nomination has been made? OGE ruled that it should because the agency was being given the disclosure report in order to exercise its official review role, see 5 C.F.R. Sec. 734.604 (c), and because the disclosure report was being treated as if there had been a nomination. (A contrary OGE ruling would have made the agency ethics officials quasi-security agents guarding the secrets of the candidates' "public" financial disclosure reports from the public—an inherently contradictory and difficult position). Again OGE believes that the Act should be amended to resolve this issue explicitly.
>
> These two types of issues associated with the Presidential Transition period should at the minimum be addressed by the Act. If they are not, needless disagreement with a future Presidential Transition Team and a slowed-down transition process may result. (Scott paper at pp. 3-4)

To explain the institutional status of the Office of Government Ethics, the "bureaucratic order of things" if you will, it is necessary first to point out the locus of responsibility for ensuring the integrity of federal executive officers and employees. To a first order, this responsibility is the President's. The Constitution directs the President to establish and maintain proper standards of personal conduct and integrity for government officials. The original understanding of the framers of the constitutional requirement that the President "take care that the laws be faithfully executed" would be compatible with today's ethics in government program. To a second order, the regulations of the Office of Government Ethics provide as follows:

> The head of each agency is responsible for and shall exercise personal leadership in establishing, maintaining and carrying out the agency's ethics program. He or she shall make available to the ethics program sufficient resources (including the assignment of investigative, audit, legal and administrative staff as necessary) to enable the agency to administer its program in a positive and effective manner.
>
> [5C.F.R.738.202 (a)]

This arrangment results, as I believe very strongly that it should, in a decentralized ethics program with substantial authority vested in agency heads and their designated agency ethics officials. The Office of Government Ethics operates, in this scheme, as a law firm and consulting firm for the agencies and departments regarding the issues that come within the Office's jurisdiction. As Mr. Scott's testimony demonstrates and as the General Accounting Office points out clearly, this scheme has succeeded. Congress established a sound basic structure and it does work. Not in all cases, to be sure, was I completely sanguine about the specific decisions reached by agency personnel but I am persuaded that the fundamental decentralized set-up of the federal executive ethics in government program represents the principled implementation of a regulatory statute in a competent and reasonable manner. It works, Senators, and that is a considerable achievement.

Let me hasten to add that a very great deal of good work went into fashioning the structure of the Office of Government Ethics and the federal executive ethics program. The singular contribution came twenty-two years ago from the Association of the Bar of the City of New York whose 1960 book, Conflict of Interest and the Public Service, was the best guide I found on many of the troubling matters of first impression that came to my attention. Roswell Perkins, a partner at Debevoise and Plimpton and a federal executive during the Eisenhower Administration, chaired the Bar Association's task force. Mr. Perkins spoke to the 3rd Annual Conference of the Office of Government Ethics in June 1982; I want to quote at some length from his comments regarding Title IV of the Ethics in Government Act and the organization of the Office of Government Ethics:

> The creation of the Office of Government Ethics was in my judgment. . .by far the most important and positive accomplishment of the 1978 Act. The perspective one has to have in order to appreciate the importance of the achievement is that it took nearly two decades in order to get the job done after strong and clear recommendations have been made to that effect. I'm referring particularly to the publication of a report of the Association of the Bar of the City of New York in 1960 in which I participated. Following the comprehensive revision of the conflict of interest laws in

1962 a full 16 years elapsed before Congress accepted our recommendations for the creation of the Office.

The need for administrative machinery with respect to the conflict of interest laws was very evident in 1960 and, again, from the standpoint of understanding the significance, I'd like to just refer to some of the things we said in the 1960 Bar Association Report, namely:

> "When administrative procedures were weak or almost unknown, no way could be seen to cope with the conflict of interest issue other than to swing the broad axe of criminal prohibition. As modern agency regulations illustrate, skillful use of administration devices such as reporting, disclosure, disqualification, advisory bodies, and variable sanctions makes it possible to deal with the conflict of interest problem with greater refinement."
>
> "In addition, imaginative use of the techniques of the modern administrative process can through totally different devices reduce the risks that the conflict of interest rules were originally devised to meet."

The fortunate event which occurred four years ago was that, after a long gestation period (which included the introduction of various bills, a recommendation by GAO, President Carter's recommendation for creating the Office and the Ribicoff Committee's report) the 1978 Act emerged with a very well drafted section concerning the Office of Government Ethics. It was well drafted, among other things, because it properly took into account the very delicate interrelationships between the office of the Attorney General, the President's office and the new office to be created.

There are five key elements in the functions of the Office of Governemnt Ethics, as I see it.

First is the preparation of regulations. Whenever a statute is enacted which deals with a complex subject and which introduces new concepts and procedures, almost inevitably regulations will be needed which more fully define statutory terms which amplify the statutory provisions and which provide, if necessary, the mechanics of implementation.

The '78 Act properly places in OGE the responsibility for developing and recommending to the Office of Personnel Management rules and regulations pertaining to conflicts of interest and ethics in the Executive Branch, and this responsibility, I should point out, is by no means limited to the substantive areas covered by the '78 Act. The regulatory initiative applies to the entire field of conflicts of interest and ethics within the Executive Branch.

It will be critically important in the forthcoming hearings, I think, that Congress be made to understand that the OGE regulations are not additive mandates expanding the area of Federal Government action, but, rather, are clarifying and interpretive regulations which are intended to and do make compliance easier and more certain, rather than the reverse.

The second area which the Office of Government Ethics has been mandated to pursue is that of enforcement. Obviously criminal statutes, such as the basic conflict of interest laws, must ultimately be enforced by the Justice Department. However, I think we should realize how much enforcement has been packed into the provisions of the statute relating to OGE. OGE must play a major role in enforcement. The Act requires it to "monitor Executive Branch enforcement of all laws relating to conflict of interest." It requires specifically that the Director monitor and investigate compliance by Executive Branch officials with the public financial disclosure requirements. It requires the Director to oversee the "manner in which agency officials are performing their responsibilities to receive and review financial disclosure reports and make such reports available to the public." OGE must establish the entire system for review of these reports, and has been given the authority to order corrective action. OGE is required by the Act to cooperate with the Attorney General in developing an effective system for reporting allegations of violations of conflict of interest laws to the Attorney General.

This panoply of responsibilities is expanded by the grant of certain authority to initiate civil penalties in individual cases, a subject which we made much of in our 1960 Bar Association Report. In performing his responsibilities to recommend regulations pertaining to the identification and resolution of conflicts of interest, the Director of OGE must develop procedures whereby the inadvertent or technical mistake made by an individual can be resolved through a civil action. This is extremely important and an innovative step.

Preventive measures are the third broad area of responsibility that is so beneficial in the structure of OGE. Those who are in this room are very familiar with these, and I need not dwell on them, but the preventive aspects of providing information, of providing briefing materials, are exceedingly important. As the Senate Report states:

> "It is anticipated under this section that the Director will conduct an ongoing program to inform Executive Branch employees of the requirements of the law and of regulations governing their conduct and establish procedures to promptly notify employees of any changes in such laws and regulations."

The major expansion of the educational process which has occurred in recent years is the result of the work of OGE and the representatives of departments and agencies in this room, and has had a major impact on improving the understanding and the awareness of problems of ethics in Government.

The fourth broad area of OGE's responsibilities is that of interpretive advice and advisory opinions. Going back again to 1960, we emphasized that the conscientious employee deserves a reliable prior answer to the question of whether his own circumstances will violate the conflict of interest statutes and regulations. The 1978 Act achieves this step forward by mandating the Director to establish a formal advisory service for rendering opinions—and that this is in addition to the Director's responsibility to assist the agency ethics counselors and to give informal advice and advisory opinions.

One sentence in the statute should be particularly heartwarming to those who have muddled in this area, and that is the requirement that the advisory opinions be compiled, published, and made available to agency ethics counselors and the public.

The fifth broad area of OGE functions is that of evaluation. Obviously, a field such as conflict of interest regulation is one that evolves and changes as Governmental functions and procedures change and as experience in applying the statutes and regulations is acquired. Accordingly, it is eminently sound that among the functions of OGE prescribed by the '78 Act is that of assisting the Attorney General in evaluating the effectiveness of the conflict of interest laws and of recommending necessary legislative action.

These, then are the critical functions which make the Office so important. I'm saying these things wholly without regard to the operation of the Office by the present team. It so happens that the present team has, in my judgment, done a superb job. The approach has been studious, measured, balanced, thoughful, and yet, as prompt and cooperative as one could ask. I think there has been strong leadership without heavy-handedness. The staff, in terms of magnitude, has been kept lean. Accessibility and openness have been particularly welcomed from the standpoint of an outsider, and I assume that the same has been true from the standpoint of those of you inside Government.

But even if the job had been bungled, the need for the Office would be just as real.

A word about the costs of OGE. In an era of cost-cutting we have to be ready for the potential argument in Congress that this is one area in which a cut could be made. To that I would say that it would be an utter waste of money to cut out the funds for OGE. If there were no OGE, the duplication of effort involved in trying to reconstruct precedents and in trying to deal with an area which no government unit would be (by hypothesis of the elimination of OGE) dealing with on a continuous basis would be far greater than the cost of the Office. The cost of one special investigation, or of one special counsel appointed because there wasn't adequate prevention or wasn't a body of precedent on the basis of which the matter could be resolved readily, would greatly exceed the budget of the Office of Government Ethics.

A final issue that I would like to address concerns the relationship between the Ethics in Government Act and presidential recruiting. In my article in the November/December 1981 issue of Public Administration Review entitled "The Ethics in Government Act, Conflict of Interest Laws and Presidential Recruiting" (copy attached as Appendix 1), I tried to sort out this very complex matter. And now, as the President of the National Academy of Public Administration, I am supervising a major study, which The Business Roundtable is underwriting, of the processes and practices involved in

presidential recruiting. The final comment draft of this study will not be available until mid-April, when I will deliver a copy to this Subcommittee. At the present time, however, I certainly am free to share several of the easier recommendations we will be be making:

(1) The expedited procedure adopted by the Office of Governemnt Ethics for reviewing the financial disclosure reports of individuals appointed by the President and subject to confirmation by the Senate [5CFR 734.604 (c)] goes some distance toward smoothing out a procedure that must be improved constantly to eliminate paperwork duplication by the prospective nominees, to achieve the maximum consensus on the substantive conflict of interest standards to be applicable to them, and to arrange for the minimum possible time delay attributable to the review of the reports.

(2) The Assistant to the President for Presidential Personnel and his staff of recruiters should learn the details of these issues and communicate them earlier and more accurately to prospective nominees in order to alleviate the "briefing" workload of the Counsel to the President.

(3) The frequent criticism of the time consumed in the appointment process is aimed at a variety of targets: the FBI investigation, compliance with the financial requirements of the conflict of interest and ethical statutes, the Senate confirmation hearing and floor action, and the candidate's difficulty in departing from previous employment. The Assistant to the President for Presidential Personnel should maintain more controls over each stage of the process until the candidate has the presidential commission in hand.

More frequent communication between the White House and majority and minority leaders in the Senate should be sought to identify ways and means for expediting the confirmation process, not only at the time of

presidential inauguration, but at other points throughout the presidential term. Wherever possible, White House information gathering should be designed to meet Senate requirements. It is particularly desirable to have a greater degree of shared utilization among Senate committees of personnel forms used, investigations required and special conflict of interest needs to be met.

(4) In view of widespread misunderstandings concerning the restrictions in these statutes, steps should be taken by the White House and by the Office of Government Ethics to educate the public generally and to inform prospective appointees in specific terms. There is considerable confusion, even among well informed individuals, about what these laws require and about the distinction between what the Ethics in Government Act requires and what the conflict of interest laws require. Misinformation and exaggeration have misled some potential candidates about the procedural burdens and substantive requirements of these laws and may have discouraged possible acceptance of federal positions.

Very simply, the data just do not exist to document adequately the relationship between presidential recruiting, the conflict of interest laws and the Ethics in Government Act. Each situation is unique. My own personal judgment, as I point out in the conclusion to my PAR article, is that the benefits to our Nation, to a President's appointees and to the President himself far outweigh the costs.

To conclude, Mr. Chairman, I do endorse the five year reauthorization of appropriations for the Office of Government Ethics as proposed in S.461. I believe the record of achievement by the Office fully justifies this endorsement and that we are here today in part to celebrate a success.

I will be happy to answer any questions you may have.

APPENDIX 1

The Ethics in Government Act, Conflict of Interest Laws and Presidential Recruiting

J. Jackson Walter, *Office of Government Ethics*

■ The Ethics in Government Act of 1978 for the first time requires senior federal executives publicly to disclose the details of their personal financial interests. The conflict of interest criminal statutes establish the standards for review of the disclosure reports. The advance review and clearance process for presidential nominees, which the Office of Government Ethics administers and upon which the confirmation committees of the Senate rely, is intended to protect the president and his nominees by prospectively enforcing prohibitions against abuses of public office for private financial gain.

The federal conflict of interest laws are involved in the recruiting and confirmation of the political leaders for the executive branch of our government in ways that warrant careful description and assessment. Central to the description is the Ethics in Government Act of 1978 that requires the president's nominees to disclose publicly the details of their personal financial interests, thereby creating records that the public and the press may scrutinize for potential conflicts of interest.[1] By manifesting the recent shift to "sunshine" in government that markedly distinguishes public sector posts from jobs in other parts of the economy where personal and financial privacy is carefully protected, the Ethics in Government Act may be in danger of becoming a scapegoat for all that is most difficult and frustrating in presidential recruiting. Whether the Ethics in Government Act has in fact shifted the balance too far, thereby effectively barring otherwise highly-qualified persons from serving in Washington, will be the subject of congressional oversight hearings that are scheduled to take place well before the 1984 presidential election.[2] At issue in these hearings will be the relative impact on presidential recruiting of such diverse factors as the Ethics Act, the long-standing conflict of interest statutes and the limitations on executive branch pay levels.[3] In the meantime, however, the presidential transition has focused greater attention than ever before on efforts to prevent future conflicts by identifying and resolving problems prior to the time a presidential nominee enters office.

For persons who do agree to accept nomination by the president to Senate-confirmed positions, the confirmation process itself can be a most rigorous test. As evidence of how central the conflict of interest issue has become, each committee of the Senate now refrains from reporting presidential nominees to the full Senate for confirmation prior to receipt of assurance from the Office of Government Ethics that the nominees will be able to assume office legally uncompromised by their personal financial interests.

Although most of this practice regarding the identification of conflicts of interest is new, the related substantive law is not. President Reagan's administration is the first to come into office since the passage of the Ethics in Government Act which, in addition to its public financial disclosure requirements, also established the Office of Government Ethics (OGE) to provide overall direction of executive branch policies related to preventing conflicts of interest.[4] OGE's judgments on the president's nominees, based exclusively on their financial disclosure reports and rendered in the form of opinion letters signed by the director of the office, are an altogether new factor. So, too, is the careful review of the financial disclosure reports by a nominee's future employing agency that serves as the basis for each opinion letter. The Senate committees, of course, long have required nominees to answer questions about personal finances and other matters. Each committee has developed its own questions and its own practices concerning standards for reviewing the answers and for releasing them to the public. Finally, it is important to note that despite the financial disclosure rules brought about by the Ethics in Government Act, nothing has changed the applicable substantive law regarding conflicts of interest. The federal conflict of interest criminal statutes (18 U.S.C. 202-209) were codified in their present form in 1962 and date back in some instances to the Civil War.

The Ethics in Government Act and the federal conflict of interest laws have consequences in three areas with respect to presidential recruiting: first, the financial disclosure requirements themselves; second, the conflict of interest laws that govern the review of the disclosed information; and third, the prospective remedies and cures for potential conflicts of interest. Although the ethics act itself may well need certain modifications,[5] the advance review and clearance process that culminates in the opinion letters of the OGE director regarding the personal financial interests of

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presidential nominees to Senate-confirmed positions does serve a number of important goals: protecting the president and his nominees, enhancing public confidence in the government's integrity, improving the effectiveness of public officials, and preventing the use of public office for private gain.

Public Financial Disclosure: The Report and its Review

When the president nominates someone to serve in a Senate-confirmed position, the nominee must prepare a financial disclosure report that will be made available to the public.[4] This is neither a net worth statement nor an income tax return; rather, it is a listing of income sources, assets, liabilities, and affiliations with other organizations that could be germane to a judgment regarding possible conflicts of interest. Assets held for investment need to be reported but personal property such as jewelry or private residences that do not produce rental income do not. Further, the reporting of assets, which generally may be done in reliance on a good faith estimate of value, is by six broad categories with a $1,000 threshold and an "Over $250,000" top bracket. OGE's list of some typical items of property that must be disclosed includes stocks, bonds, securities, and commodities contracts; commercial crops, whether growing or held in storage; antiques owned for resale; art held for investment; pensions and annuities; and money market mutual funds. Ownership must be disclosed for the nominee and for the nominee's spouse and dependent children. The disclosed information, which is accepted at face value for purposes of reviewing the report, is reported subject to the criminal false statement statute, 18 U.S.C. 1001.

To explain the review of a financial disclosure report, it is easiest to begin with the final work product of each review, namely, the opinion letter by the OGE director. In their least complicated form, these letters read as follows:

Dear Mr. Chairman:

In accordance with the Ethics in Government Act, I enclose a copy of the financial disclosure report filed by [the nominee]. The President has nominated [the nominee] for the position of [ ] in the Department of [ ].

We have reviewed the report and have obtained advice from the Department of [ ] concerning any possible conflict in light of the Department's functions and the nominee's proposed duties. Based thereon, we believe that [the nominee] is in compliance with applicable laws and regulations concerning conflicts of interest.

Sincerely,

Director, OGE

Keeping in mind this example of the end of the process, it should be possible to start at the beginning and fit all the pieces together into a reasonably coherent picture of how this advance review and clearance works.

The Rules. At the center of this entire topic is the distinction, and the possibility of a clash, between an official's interest in his private economic affairs and the government's (and public's) interest in the proper administration of the official's office. The scope of the conflict of interest criminal statutes is narrower than might be supposed from this formulation of the matter. For example, they reach only the executive branch of the federal government and relate only to the financial interests of government officials. Further, more serious larcenies such as bribery or fraud are not considered to be conflicts of interest.[7] Although the conflict of interest laws are criminal statutes, the regulation of conflicts of interest is concerned with potential harm and is decidedly civil and prospective in nature.

Reviewers of financial disclosure reports look to four different sets of prohibitions in the conflict of interest laws:

1. Restrictions against participation in matters in which an official has a personal financial interest. (18 U.S.C. 208)

This, the most common and obvious type of conflict of interest, concerns those cases in which an official is called upon to act for the government in a particular matter that could result in a personal financial benefit. Awarding a contract to a company in which an official owns stock, for example. The usual test is whether an official's participation in the matter will have a direct and predictable effect upon the financial interests of the official, the official's spouse, dependent children, partner or enterprise with which the official is affiliated.

Although the conflict of interest laws are criminal statutes, the regulation of conflicts of interest is concerned with potential harm and is decidedly civil and prospective in nature.

2. Restrictions against receipt of supplementation of salary from nongovernmental sources for services to the federal government. (18 U.S.C. 209)

Some of the reviewer's most difficult problems relate to this statute because many presidential nominees receive severance payments from their former employers. The usual test is whether the payment is for past services to a former employer—in most cases, this is demonstrably true because the payment is made pursuant to a formal corporate policy and plan—or for the illegal purpose of augmenting an official's government salary. Satutory exceptions permit continued participation in a former employer's *bona fide* pension, retirement, or other welfare or benefit plan.

3. Restrictions against participation in outside matters that involve the United States. (18 U.S.C. 203 and 205)

The basic point of these two statutes is that an official cannot be paid for or act in a representative capacity regarding activities outside his or her official duties that involve the interests of the government in a direct and substantial way. Both laws have quite complex consequences that need not be explored here. These statutes can be of particular concern to a reviewer who is analyzing, for example, a nominee's proposal to remain on the board of directors of a corporation that might use the fact of the directorship to further its interests before a government agency unrelated to the one in which the nominee is to serve.

4. Restrictions against post-employment representational activities. (18 U.S.C. 207)

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Here is the "revolving door" law, which was substantially amended by Title V of the Ethics in Government Act. Because the act vested civil jurisdiction over this statute in OGE, there are regulations that authoritatively explain the impact of this complex set of prohibitions.[8] For the reviewer, however, the "revolving door" law is not a factor because it applies only to former government officials. This statute clearly should be of major concern to presidential personnel recruiters who must be able to reassure prospective nominees that government service will not destroy their future opportunities with non-governmental employers.

In addition to the criminal conflict of interest statutes, Executive Order 11222 prescribes comprehensive standards of ethical conduct for federal officials.[9] As a compact between the president and all employees and officers in the executive branch, the Executive Order ought to be read by reviewers as reinforcing the conflicts statutes because it is concerned directly with the elusive issue of "appearances." Its practical effect is to proffer guidance on the design and analysis of prospective cures of possible conflicts of interest, as discussed in a later part of this paper.

The Players and Possible Problems. First in time and importance among all the reviewers of public financial disclosure reports are the attorneys in the *Office of Counsel to the President*. These lawyers can work with the prospective nominees and with the staff of the assistant to the president for presidential personnel before an announcement is made of the president's intent to nominate someone. Having confidential access to a prospective nominee's personal financial situation, in much greater detail than appears on the public financial disclosure report, and to personal background information and reports by the FBI and IRS,[10] these White House attorneys can explain the applicable conflict of interest statutes and regulations to the unannounced nominees and can counsel them regarding appropriate cures and remedies prior to OGE's public review process.

The Executive Office of the President, and specifically the Office of Counsel to the President, furnishes the financial disclosure reporting forms to the nominee and forwards the completed forms to the *designated agency ethics officials* (DAEO) at the agency in which the nominee will serve. DAEOs—typically, the general counsel or deputy general counsel—are formally appointed by the head of each agency who is directly responsible for the agency's ethics in government program.[11]

The Office of Government Ethics relies upon the DAEOs to conduct a review since, as agency officials, the DAEOs know in detail the duties of the office in which the nominee is to serve, the agency's own specific conflict statutes and regulations, and the particular matters that most likely could result in a conflict of interest given the nominee's disclosed financial interests. Additionally, the importance that OGE attaches to these agency reviews underscores the decentralized structure of the federal ethics in government program and the fundamental responsibility of the head of each agency for the honesty and integrity of its employees. Having completed a thorough review of the financial disclosure report, the DAEO personally must certify directly on the reporting form that it discloses no conflict of interest under applicable laws and regulations. The report is then forwarded to the Office of Government Ethics, together with an opinion letter from the DAEO to the OGE director that summarizes any problems that were encountered in reaching the conclusions on which the certification was based and any prospective cures undertaken by the nominee. OGE regulations require the agencies to complete these reviews within three days after receipt of the report.[12]

Although signature by the OGE director is the final formal step in the reviewing of a financial disclosure report, the actual staff review work by the *OGE attorneys and management analysts* proceeds in tandem with the agency reviews so that problems can be identified and resolved as rapidly as possible. The network that has grown up around the extensive "telephone practice" of the OGE attorneys has established the basis for this cooperation.

This statute clearly should be of major concern to presidential personnel recruiters who must be able to reassure prospective nominees that government service will not destroy their future opportunities with non-governmental employers.

The decentralized administrative structure of the review process for financial disclosure reports enhances the ability of the OGE staff to make an informed prospective judgment regarding the potential for conflicts of interest with respect to presidential nominees. When none exists, the opinion letter of the OGE director goes forward to the Senate in the unqualified form set out above. As the following seven typical examples illustrate, however, there are instances when the review does identify possible problems.

- A nominee will be unable to make the decisions expected of the incumbent in the position in which the nominee is to serve without considering proposals advanced by firms in which the nominee has financial interests.
- A nominee owns common stock in a company the ownership of which is prohibited by the organic act of the department in which the nominee is to serve.
- There is a remote possibility that a particular matter will come up for decision by the nominee that will involve a firm in which the nominee has a financial interest.
- The board of directors of a nominee's previous employer elects to break its tradition of not awarding severance payments in the nominee's case because of a particularly noteworthy contribution by the nominee to the firm's profitability.
- A nominee proposes to continue to serve as a paid director of a closely held family corporation whose business is unrelated to the jurisdiction of the department in which the nominee is to serve.
- A nominee is to serve in a position that develops a department's regulatory policy regarding the business of the nominee's previous employer, in which the nominee has no continuing financial interests.

- A nominee takes a leave of absence from a previous employer in order to serve in a federal executive position.

Prospective Remedies for Possible Problems

In addition to prominent press coverage and civil sanctions, alleged violations of the conflict of interest statutes by government officials may be subject to criminal prosecution.[13] In a sense, OGE's advance review and clearance process amounts to prospective enforcement of criminal laws by requiring nominees to take precautionary steps to stay out of harm's way. Authority for OGE to take the lead in seeking to prevent conflicts of interest derives from the office's grant of authority in the Ethics in Government Act and from a May 1980, Memorandum of Agreement with the Department of Justice in which OGE's authority to render advisory opinions on the conflict of interest laws was acknowledged expressly.

The tools and techniques available to fashion prospective cures generally are adequate to the task of bringing nominees into compliance with the conflict of interest laws. To illustrate, consider four approaches to remedying a possible problem under 18 U.S.C. 208, the straightforward restriction against participation in particular matters in which an official has a personal financial interest.

In addition to prominent press coverage and civil sanctions, alleged violations of the conflict of interest statutes by government officials may be subject to criminal prosecution.

Disqualification or recusal. If a nominee owns stock in a firm that could have particular matters at issue before the office in which the nominee is to serve, the nominee should be put on notice regarding the relationship that is prohibited by §208. In such situations, OGE strongly prefers the nominee to agree in advance not to participate in any matters involving that firm. If the nominee honors the agreement and if the nominee's office staff screens out all related paperwork, then disqualification will prevent conflicts.[14] This remedy seems practical and recusal agreements are, in fact, "boilerplate" language in the opinion letters sent by many DAEOs to the OGE director. But this approach has less utility in those infrequent cases when the nominee has such extensive financial interests that, in order to avoid conflicts of interest, the nominee makes so many recusal agreements as to become unable to perform the duties of office.

Waivers under 18 U.S.C. 208(b). Federal agencies may, by regulation, adopt what amounts to a *de minimis* exemption of general applicability to the §208 restrictions by finding that certain kinds of financial interests are "too remote or too inconsequential to affect the integrity" of the services to be rendered by an official. In individual cases, the government official who appoints the nominee can make an anticipatory waiver of the §208 restrictions by determining in advance that the nominee's publicly disclosed financial interests are "not so substantial as to be deemed likely to affect the integrity of the [nominee's] services." A §208(b) waiver is an absolute statutory cure but for various reasons, including an inability to make the necessary factual determination or a political reluctance to do so, resort to the statutory cure of §208(b) anticipatory waivers has not been a regular practice.

Divestiture. If a nominee no longer owns a financial interest, it cannot pose even a possible conflict of interest. Many presidential nominees, their spouses and dependent children sell holdings that could become compromising in order to put the matters completely to rest. Divestiture is a complete remedy with respect to the asset that has been sold. Except in the case of certain departments' organic acts that expressly prohibit employees and officials from owning certain prohibited holdings,[15] it is the inescapable logic of an unavoidable conflict of interest, rather than any statute or regulation, that dictates divestiture. Because of the vagaries of the markets and the tax code, this can be a very expensive cure.[16]

Blind trusts. To prove a violation of §208, a prosecutor must show that the official knew that he or she had a financial interest in a matter that the official had acted upon. The theory of blind trusts as a cure for possible conflicts of interest is that, if an official does not know what he or she owns, then it is impossible for the official intentionally to take actions to benefit specifically the official's personal financial interests. Therefore, the general public policy goal to be achieved by the use of blind trusts is an actual "blindness" or lack of knowledge by the official with respect to the trust's holdings.[17]

Prior to enactment of the blind trust provisions of the Ethics in Government Act, there were no statutory or regulatory standards for a properly formulated blind trust. Congress suspected that many pre-act blind trusts were flawed by "20/20 vision" although there was general agreement that proper use of blind trusts could ameliorate potential conflicts of interest. The provisions of the act are extremely complex; the basic formula authorizes OGE to approve or "qualify" blind trusts provided they have a truly independent trustee, acceptable assets, and a trust instrument meeting certain minimum standards.[18] Obviously, qualified trusts are not subject to the full public financial disclosure requirements because the officials must not be allowed to discover their holdings. In certain special circumstances, therefore, establishment of a qualified trust may sidestep neatly an official's exposure to possible conflicts of interest.

These four approaches to remedying possible problems under 18 U.S.C. 208 are flexible enough to permit their adaptation to individual situations on a case-by-case basis. Executive Order 11222 is the best guide to the public policy objectives that should govern the fashioning of remedies by OGE, the nominees, DAEOs and Office of Counsel to the President. The most important part of the Executive Order counsels government officials to avoid any action that might result in, or create the appearance of:

(1) using public office for private gain;
(2) giving preferential treatment to any organization or person;
(3) impeding government efficiency or economy;
(4) losing complete independence or impartiality of action;
(5) making a government decision outside official channels; or
(6) affecting adversely the confidence of the public in the integrity of the government."

In nearly all cases, it has been possible to design remedies that nominees and their families do accept. The costs associated with these remedies, particularly in terms of tax liabilities[30] and disruptions of personal and family financial planning, in specific cases can be high. The conflict of interest statutes occasionally can be characterized, therefore, as a legislative limitation on presidential recruiting because they represent fundamental standards of eligibility for federal public office-holding with which not all the highly qualified persons in the country may choose to comply.

For presidential recruiters who are trying to persuade prospective nominees to move to Washington, possible §208 problems are the most cumbersome to resolve of all the potential conflicts of interest. Three other recurrent conflicts of interest issues, which appear in the earlier list of seven illustrative examples, deserve separate treatment.

Leaves of absence. A corporate executive who takes a leave of absence to accept a presidential nomination clearly should be disqualified from participating in decisions that will affect the corporation directly and predictably. This recusal agreement makes sense and the executive should agree readily. The presidential recruiter should known, however, that the "revolving door" law, 18 U.S.C. 207, will concern an executive who hopes to return to a job that involves representing the corporation before the executive branch of the federal government. It is critical that the attorneys in the Office of Counsel to the President and at OGE be able to advise the executive knowledgeably and sensibly on this matter because misunderstanding the detailed impact of the conflict of interest laws frequently makes their effect seem to be more sweeping—and a much greater deterrent to serving in Washington—than is the case. (For example, a specific exemption in the "revolving door" law greatly diminishes its impact on professors who take leaves of absence from universities to accept presidential nominations.)

Divestiture is the inescapable logic of an unavoidable conflict of interest.... Because of the vagaries of the markets and the tax code, this can be a very expensive cure.

Severance payments. Prospective nominees often receive substantial severance payments from their former employers, thereby offsetting the personal financial sacrifices that result in some cases from limitations on executive branch pay levels. These severance payments necessarily concern reviewers of financial disclosure reports because judgments must be made with respect to the intent or motive of the former employers. Rewards for past services are of course acceptable; augmentation of an official's federal salary "as compensation for" government service is the prohibited practice under 18 U.S.C. 209 and it matters not at all that a prior employer's business has nothing to do with the office in which the prospective nominee is to serve. Paying moving expenses to Washington or guaranteeing the rental of a hometown house could be illegal payments. It is extremely difficult to document the motive or intent of the previous employer; relevant evidence that OGE's reviewers examine include resolutions of the corporate board of directors, statements by corporate officers and provisions of any corporate policy and plan regarding severance payments.[31]

Bias or prejudgment. Questions of "bias" or prejudgment on policy matters do not come within the reach of the conflict of interest laws.[32] Thus, a corporate official legally may accept without qualification nomination to a regulatory position having jurisdiction over his or her former business, as long as the official has no continuing financial interests in firms engaged in that business. Such things as vested pension rights or re-employment agreements could be financial interests that create possible §208 problems. But bias or prejudgment on policy issues is not, by itself, an issue under the conflict of interest statutes. Whether or not the record of a nominee's previous career will permit objective and impartial performance in government office is a decision to be made in the first instance by the president, who is the appointing authority, and subsequently by the Senate, which is the confirming body.

Summary

What conclusions can be drawn from this complex of laws and regulations that is intended to foster public confidence in the integrity of our government? First of all, the criticism that portrays the Ethics in Government Act as the significant barrier to presidential recruiting frequently has been imprecise and hence somewhat misleading. The prevailing executive branch salary levels and the increasingly corrosive quality of public life[33] have nothing to do directly with the ethics act but certainly do discourage many people from federal public service. In this regard, there are only three aspects of the ethics act to be considered: the financial disclosure provisions, the blind trust rules, and the "revolving door" bars. The public financial disclosure requirements certainly are stringent but very few people have turned down a presidential job offer solely because they refused to file the required report. The blind trust rules actually are intended to alleviate the impact of the conflict of interest laws. The "revolving door" bars do not appear to have been an insurmountable problem for departing Carter administration officials.[34] Apparently more serious than these three explicit ethics act topics as obstacles to presidential recruiting, however, are such closely related laws and regulations as the conflict of interest statutes themselves, the costs—particularly the tax liabilities—associated with curing problems identified by OGE's rigorous prospective enforcement system, and the prohibited financial holdings provisions of the organic acts and rules of various agencies. As stated at the outset, the ethics act may have become a popular shorthand reference to, and a scapegoat for, this entire array of barriers. This imprecision

could itself create problems if one were to jump to the conclusion that the difficulties of presidential recruiting could be eased significantly by amendments to the Ethics in Government Act without corresponding attention to the other and arguably more serious obstacles.

Second, and most important, the conflict of interest review and clearance process regarding presidential nominees to Senate-confirmed positions established by OGE as a result of the Ethics in Government Act reinforces our nation's long tradition of frowning on the abuse of public office for private gain. However frequently and brazenly that tradition may have been flouted, the conviction that "public office is a public trust" does have deep roots here. It was the same fundamental public policy and popular sentiment that caused the First Congress in 1789 to prohibit the secretary of the Treasury from investing in government securities, that led to the passage of the precursor to 18 U.S.C. 208 in 1863 to curb frauds by Civil War supply contractors upon the United States, and that resulted in the issuance of Executive Order 11222 in 1965. It is the constitutional responsibility of the president to establish and maintain proper standards of personal conduct and integrity for government officials. Although advocates of advanced management techniques have tried to appropriate the provisions of Article II, Section 3, in support of their prescriptions, the original understanding of the framers of the constitutional requirement that the president "take care that the laws be faithfully executed" would be compatible with today's ethics in government program.[10]

The third and concluding point is that the conflict of interest review and clearance process not only serves lofty objectives of public policy but also contributes to the political effectiveness of a president's nominees. Succeeding in official Washington requires leaders to demonstrate not only decisiveness but also the personal strength of character to make decisions stick, once made. For many presideutial nominees, preparation of the public financial disclosure report turns out to be their initiation into "government in the sunshine" and a first recognition that a myriad of people and pressures could and probably will challenge their authority by choosing to point to, as one among many possible targets, an appearance of compromising personal financial interests.[10] Because the OGE public review process is based exclusively on publicly available information, the opinions of the OGE director that the nominees are "in compliance with applicable laws and regulations concerning conflicts of interest" protect an administration by shielding a president's nominees from attacks based on alleged financial conflicts of interest. Holding the leaders of the executive departments publicly accountable to high standards of personal financial integrity must be a starting point for any presidential administration's program for governing this country.

Notes

1. Ethics in Government Act of 1978, Pub. L. 95-521, as amended, at Title II, "Executive Personnel Financial Disclosure Requirements"; 5 U.S.C. app. 201 *et seq.*

   This paper considers only the narrow question of the impact of the conflict of interest laws and the Ethics in Government Act on presidential recruiting for Senate-confirmed positions in the executive branch and does not attempt to discuss other topics related to the ethics act nor to review the conflict statutes in a comprehensive manner.

2. Section 405 of the Ethics in Government Act authorizes an appropriation for the Office of Government Ethics through the end of Fiscal Year 1983. It will likely be in the context of the statutorily required reauthorization process that Congress will assess the overall impact of this legislation.

3. The close interrelationship of these factors was a critical analytical and political feature of the recommendations by the Commission on Executive, Legislative and Judicial Salaries, in its report of December 1976. The "Peterson Commission," as this group was popularly known, made the following recommendation:

   "The commission proposes—although recognizing that its only mandate is to propose certain salary increases—that these recommended increases be 'tied' to the establishment of new and stringent Codes of Public Conduct, so that the long and painful process of restoring public confidence of the governed can begin with tangible evidence that 'the era of Watergate' is finally over." (p. 2)

   The 1980 Report of the Commission on Executive, Legislative and Judicial Salaries, popularly known as the "Quad [rennial] Comm," endorsed this recommendation.

4. The Office of Government Ethics was established in the Office of Personnel Management, 5 U.S.C. app. 401(a). The approach of the Office of Government Ethics to implementation of the Ethics in Government Act derives guidance from several major sources: Association of the Bar of the City of New York, Special Committee on the Federal Conflict of Interest Laws, *Conflict of Interest and Federal Service*, Harvard University Press, 1960; Robert C. Wood, "Ethics in Government as a Problem in Executive Management," *Public Administration Review* Vol. 15, (Winter 1955) p. 1; Robert C. Wood, "Caesar's Wife in the Late Twentieth Century," unpublished speech delivered at OGE's First Annual Conference, April 7, 1980, Washington, D.C.; B. Manning, *Federal Conflict of Interest Law*, Harvard University Press, 1964; Roswell B. Perkins, "The New Federal Conflict of Interest Law," 76 *Harvard Law Review* 1113 (1963).

5. The fundamental issue, of course, centers on whether or not the Ethics in Government Act of 1978 has been a significant impediment to presidential recruiting. Edwin Meese III, counselor to the president, was quoted in *The Washington Post* of June 18, 1981, as follows:

   "The problem [of recruiting conservatives] was largely one of perception rather than reality. There were lots of good people in the pipeline, *but the problems in getting them through it, which never were as much as they were made out to be*, caused some criticism." (p. A12) (author's emphasis)

   In addition to the question of whether and how to amend the ethics act in order to strike the "correct" balance, cf. *infra* at p. 12, there is a general recognition within the executive branch of certain technical problems attributable to unclear language in the act, including generally when to make public the financial disclosure reports of prospective nominees and specifically the proper treatment of the reports of the intended nominees of a president-elect prior to inauguration, to which issue the act is silent; and, given the long-standing position of the Department of Justice that the holdings of a

trust of which a government official, the official's spouse or dependent children are beneficiaries are deemed to be assets of the government official for the purposes of 18 U.S.C. 208, how to handle "old family trusts," i.e., trusts established by an ancestor for the benefit of his or her heirs, including a nominee, to which problem the act provides at best confusing guidance.

6. Public access to the financial disclosure reports is restricted to persons who identify themselves and any organization on whose behalf they are acting and who agree not to use the reports for such unlawful purposes as determining credit ratings or soliciting money, 5 U.S.C. app. 205.

   Regulations concerning the public financial disclosure requirements appear at 5 CFR Part 734. The requirements applicable to nominees for Senate-confirmed positions are narrower in scope than those applicable to incumbents who are required to report.

   Duplantier v. United States, 606 F.2d 654 (5th Cir. 1979), *cert. denied*, No. 79-1180 (Jan. 12, 1981). The Fifth Circuit upheld the constitutionality of the judicial branch (Title III) public financial disclosure provisions of the Ethics in Government Act.

7. The Department of Justice, of course, retains exclusive prosecutorial authority with respect to these more serious larcenies, the conflict of interest laws, and all other federal criminal statutes.

8. Regulations concerning post-employment conflicts of interest appear at 5 CFR Part 737.

9. Executive Order 11222, "Prescribing Standards of Ethical Conduct for Government Officers and Employees," Lyndon B. Johnson, May 8, 1965.

10. The Office of Counsel to the President obtains access to this otherwise confidential information as a result of various consents and waivers that each prospective nominee must execute in order to facilitate the personal background investigations.

11. Regulations concerning the responsibilities of agency heads in the ethics in government program appear at 5 CFR 738.202.

12. Regulations concerning an expedited procedure in the case of individuals appointed by the president and subject to confirmation by the Senate appear at 5 CFR 734.604(c).

13. As provided at 28 U.S.C. 535(b), the head of a government agency shall report to the attorney general any information, allegation or complaint relating to violations of Title 18 involving government officers and employees.

14. Cf. "Chinese wall" approach to issues concerned with the imputed disqualification of attorneys adopted at Formal Opinion 342 of the Ethics Committee of the American Bar Association, 1974.

15. For example, 42 U.S.C. 7212(a), a part of the organic act for the Department of Energy, prohibits supervisory employees of the department from owning "pecuniary interests" in any "energy concerns." By way of contrast, Department of Transportation regulations prohibit employees of that department from having "a direct or indirect interest that conflicts, or appears to conflict, with [the employee's] government duties and responsibilities," 49 CFR 99.735-13.

16. Under the existing provisions of the Internal Revenue Code, no relief is available to prospective or incumbent executive branch personnel from the requirement of recognizing gain (if any) upon the divestiture of property when such action is appropriate to ensure compliance with 18 U.S.C. 208 and other federal conflict of interest statutes and regulations. At the time of this writing, preliminary discussions of ameliorative legislation are taking place between congressional staff and executive branch persons.

17. With respect to trusts established by someone other than the federal official who is an income beneficiary, Sec. 202 (f)(2)(B) of the Ethics in Government Act provides an exemption from public financial disclosure of the details of the trust's holdings if the incumbent has "no knowledge" of the trust assets; these are called "excepted trusts."

18. Regulations concerning qualified trusts appear at 5 CFR 734, Subpart D.

19. Executive Order 11222, *supra* at note 6, §201(c).

20. Cf. *supra* at note 16.

21. Efforts to avoid the non-augmentation rule by contracting for the former executive's personal services during the official's period of government service—as an outside corporate director or consultant—also could run afoul of 5 U.S.C. app. 210 that prohibits a Senate-confirmed official from receiving earned income in excess of 15 percent of the official's federal salary.

22. Cf. Recommendation 80-4, Decisional Officials Participation in Rule-making Proceedings, Administrative Conference of the United States, June 1980.

23. Cf. Suzanne Garment, "The Ethics Act: Where Will Disclosure Stop?," *Wall Street Journal*, March 13, 1981. Garment in part, notes:

   "The current system of bans and disclosures is working together with other things to make public service a kind of degradation ritual for businessmen. Someone supplied an example from an agency he was familiar with: 'I know a guy who would have made a wonderful commissioner. But when you put together the disclosure, the post-employment rules, the abusive congressional hearings, the salary, the press—he just wouldn't buy. The effect is cumulative.' "

   Cf. William A. Henry, III and Douglas Brew, "Molasses Pace on Appointments," *Time*, May 11, 1981, p. 19.

24. Cf. Stuart Taylor, Jr., "Those Job-Hopping Carter People," *New York Times*, May 10, 1981, p. F-1.

25. Robert C. Wood, *supra* at note 2, *Public Administration Review*, vol. 15, pp. 2-3. The Ethics in Government Act incorporates this understanding in that the director of the Office of Government Ethics is a presidential nominee in a Senate-confirmed job.

26. Cf. Hugh Heclo, *A Government of Strangers: Executive Politics in Washington*, Brookings Institution, Washington, 1977.

TESTIMONY OF ANN McBRIDE, VICE PRESIDENT FOR PROGRAM OPERATIONS, COMMON CAUSE

Ms. McBRIDE. I appreciate the opportunity to testify today, and thank you, Senator Cohen and Senator Levin, for the leadership that you provided in extending the Special Prosecutor provision of the Ethics in Government Act, and we appreciate again your timely and thoughtful consideration of these ethics issues.

Let me start out by saying that Common Cause believes that the Ethics in Government Act has worked well. I think when you look at the activities that are going on in EPA, it proves why this act and others guard against conflicts of interest and continue to be necessary.

We believe that the Office of Government Ethics should be reauthorized. Since 1978, it has played a very important role, a lot of which has been detailed today. One of the key kinds of things that was discussed today is the role of the OGE in the transition period. We think they did do a good job, but as you pointed out, Senator Levin, the confidence that the American people and the Congress can have in this and other decisions on behalf of the OGE has a direct relationship to how independent the Office actually is and is perceived to be.

We therefore believe that there should be a fixed tenure for the Director of the OGE rather than the present relationship of serving at the pleasure of the President.

I just want to say briefly that, as we know, and as has been pointed out this morning, the directorship of the Office of Government Ethics has been vacant for quite a while. We believe that one of the reasons that the OGE has been effective in the past is certainly the law, but it has also been the commitment of the Director and the now Acting Director to the goal of this agency and of the underlying laws.

We believe the nomination of Director of the OGE becomes a key test for the Reagan administration, an administration which I feel compelled to point out has had a far-from-stellar record on matters of conflict of interest. In the past 2 years, significant questions have been raised about a number of officials, including those at the top levels of Government, including the Attorney General, the Director of the CIA, as was mentioned this morning, and most recently, appointees of the Environmental Protection Agency.

In addition, Counsel Fred Fielding, who is responsible for ethics at the White House, has been highly critical of the Ethics Act and has advanced publicly, most recently at the Office of Government Ethics Conference, proposals which we believe would gut and undetermine the act particularly—although there are others—in the public financial disclosure area.

So we really think that in this context, it is extremely important that the President nominate someone for this position who is not only of unquestioned integrity, but who is committed to the mission of the OGE and who is committed to vigorously enforcing and implementing the laws.

In addition, Mr. Chairman, we would believe that if a sunset date is applied to the OGE, it should be 10, rather than 5 years.

Let me touch on just a couple of points, one of which is the value of public disclosure. We believe any move to cut back on public disclosure, either on the public nature of it or the information which is disclosed, strikes at the heart of this act.

It must be remembered that it was the public disclosure of William French Smith's $50,000 severance agreement that brought this to the attention of the public. It was the fact that we knew it was $50,000 that proved it was of an improper nature, because the $50,000 was more than he had received in the previous 6 years from his service on this firm's board of directors.

For many of the same reasons, we would also oppose having just confidential disclosures for high-level civil servants. These people—the so-called "supergrades"—exercise an enormous power in Government, and we think, because they are less in the public spotlight, public disclosure is important for them.

We have, as I have outlined in my written statement, specific kinds of technical amendments that we think would help make the post employment restrictions work better—the blind trust work better. But in both of those areas, we think in trying to perfect or tinker, we must be very careful not to back away from the coverage of the post employment restrictions, or the fact that blind trusts should, in fact, separate the public official from his or her holdings.

In conclusion, let me just say that there has been a question raised about recruiting, and it is a very fundamental question. The Ethics Act, in many ways, has become the public whipping boy for all of the problems that become wrong with government.

Jack Walter says that there is no—and I agree—no statistical evidence to show that this is true. I just would like to quote from White House Counsel Fielding, who has said that the Ethics Act has hurt recruiting. He said, at a 1981 OGE conference:

> To be fully honest about the whole thing, we do not know how many people used the Act in their conversations with us as an excuse, because although they were flattered to be asked, they did not want to accept, for another reason, probably financial.

Common Cause believes, and the studies of OPM show, that people are leaving Government because of salaries. That's why we have consistently fought for appropriate and regular pay increases for Members of Congress and for officials in the executive branch.

We think that this is a major problem that is facing the country and one which probably directly relates to the ethical problems that face the Nation——

Senator COHEN. Let me interrupt you for a moment.

Wouldn't it also be true that people who serve at that level of Government; namely, as an agency head, usually tend to do a lot better when they leave, doubling, tripling, quadrupling their salaries?

Ms. MCBRIDE. That is true, but the people who bear the brunt of salary levels are civil servants and others who do not have that kind of advantage and yet they have served and been bumped up against the pay cap.

Senator COHEN. I'm not as familiar as you are with the public statements, but he was perhaps directing comments to their attempts to get people into the Government service and finding that

there are very young, bright, successful businesswomen and men who want no part of public service. I can tell you right now that this is true. They don't like the pay. More importantly, they don't like the public disclosure or all that they have to go through, in terms of divesting themselves or establishing blind trusts.

There are some legitimate comments and criticisms about the extent of disclosure as an issue and whether or not that is outweighed by the overall general public policies of financial disclosure.

I think it is true that we will lose good people who will not go into Government service. We still prefer, however, to set these standards at the expense of losing these people. I don't think we can dismiss the fact that there are people, in fact, who are qualified and competent and would, otherwise, be willing to serve, but do not like the Ethics in Government Act or the conflict-of-interest statutes or the disclosure or the scrutiny or the press or all of the other things that go with it.

It is not simply pay. They will do better, in many cases, when they leave public service than when they came in.

Ms. McBRIDE. Certainly, Senator Cohen. I would agree with what Jack Walter has said, that there are a few isolated cases of people who choose not to serve because of the Ethics Act.

But there is an illusion that the Ethics Act has greatly harmed recruitment. There is simply not the evidence there to prove this and this has been shown when people are confronted. And I think while in some isolated cases it is true, one must look, as you say, at what the Ethics Act has done to restore confidence, to reduce conflict of interest.

Senator COHEN. I do not want to refer specifically to the Ethics Act. I am not sure, as Pendleton James said, that people out there know about the Ethics Act. They may know that if they go to the executive branch they will come before Congress. They have to go through a scrutiny process. They have to have their financial records examined, and on and on and on.

The general perception is it is not worth the price they have to pay. I don't think any of them referred to the Government Ethics Act, and maybe Pen James is correct, that at that point they are not aware of it, but they are aware that there is a price to be paid for engaging in public service.

I would say that what we come down to is that we want to extend the act because we think the price is worth it. We feel the overriding public issue is that we want to make sure that we set these standards which are not the highest, but are minimum. We could impose stricter standards in some cases.

There are people who choose not to go into Government service on a general perception that they really do not want to pay that price. In the private sector they can keep their life private. They do not have to account to anybody but their bosses and their associates.

That is a factor. It is not just this act.

Ms. McBRIDE. I was struck recently, by an article in Dun's Business Week about the blind trust provisions, where you had all of these officials interviewed, really criticizing the act.

Yet at the conclusion of it, almost everybody who had been critical said it has been worth it. Government service outweighs these kinds of things.

And I also thought it was interesting that William French Smith, who, after he had certainly felt the full force of the Ethics Act, was quoted in the Washington Post as saying Government service is worth it. He said it offers a fascination that does not exist in public life. Government service ought to be rewarding. It should be rewarding.

We certainly were concerned with the passage of the act that you balance the privacy rights of the individual against the public's right to know and against the need to guard against conflicts of interest.

I think those questions are legitimate, and a lot of it is a balancing act. We would just feel the balance has worked, that the act has not driven people out of office, and there are OPM statistics on that, and that, in fact, there are people, a pool of people out there, who want to come into Government and view it as rewarding.

And in our view, in fact, the Ethics Act enhances public service. If you don't have ethical standards, the lowest common denominator sets the standard for the institution.

Senator COHEN. You have no criticism of Mr. Walter's performance while he was in the office, right?

Ms. MCBRIDE. Again, we don't. We have worked closely with him and with the Office of Government Ethics. We did studies on the Ethics Act and they have been open, certainly accessible to people from our office who have worked there. We think the OGE has worked well.

Senator COHEN. Similarly with Mr. Scott? No difficulty there?

Ms. MCBRIDE. I feel for Mr. Scott. He has had a difficult position here today, and I certainly would agree with his personal views presented here today and believe he has performed well as Acting Director.

Senator COHEN. The question I have, is whether this will be a test of the Reagan administration's commitment to ethics in Government as to whom they put in that particular spot?

One of the points that I raised earlier today is that perhaps we have to make the structural changes first. You have the unique situation where Mr. Scott may have more independence and flexibility than—perhaps not Mr. Walter—a new appointee might have. We have a better situation now where a man who is a career official is making decisions.

What problem would you have if this continues much longer? Would it mean a lack of commitment on the part of the Reagan administration to ethics in Government?

Would you say that his continued presence in that job as Acting Director is evidence of a commitment to a strong independent-minded, independent-acting administrator?

Ms. MCBRIDE. Senator, I would stick with Mr. Scott in terms of what I believe is his full commitment to the act, in the way I have seen him perform, but if the Reagan administration, as Mr. Scott answered in one of your questions to him, has someone in mind to nominate we are not talking theoretically, should there be an appointee or should there not.

We are talking that in fact the Reagan administration does have someone in mind, and in that situation, either with or without the structural change, which we support, this is a test for the Reagan administration, and an Administration that in our view has not had a good record on ethical questions.

We also think it is a strong test for this committee because we know it is very difficult to oppose a nominee from the President. If this person is not appropriate, if he or she does not meet standards, we think this committee should not recommend confirmation.

Senator COHEN. What kind of standards are you setting? What kind of standards is Common Cause setting?

Ms. MCBRIDE. One of the main standards is a real commitment to the mission of the agency.

In this we certainly have had problems in recent weeks and questions raised in the press about people appointed who were not committed to the mission of the agency. It should be a person with obviously unquestioned integrity, for whatever that standard is, high integrity, but someone who in addition is committed to vigorously enforcing these laws and believes that they are correct, and someone who will go beyond simply the question of "Is it illegal," but what can we do to comply with both the spirit and the letter?

Senator COHEN. What kind of background would you set as a test? Does he or she have to have any particular kind of a background?

Ms. MCBRIDE. I would not know.

Senator COHEN. So if a person who was appointed was intelligent and otherwise qualified and said that he or she has a commitment to assuring that the government remains an ethical government, would that satisfy Common Cause? Does it take more than that?

Does it take past performance, experience, writings? What is the test?

Ms. MCBRIDE. One would certainly want to look at someone's past record in whatever field it was. Is he or she, qualified by past performance—again, this is not an area where one has necessarily a career in ethics.

Senator COHEN. That is the problem.

Ms. MCBRIDE. It is a problem in many ways. But I believe when we see the nominee, we will know. There can be judgments made. Having watched the two of you this morning, I think that there will be a lot that can be brought out by having to go through questioning by this committee, in terms of not only the person's commitment, their intelligence. There is a whole variety of things that I think can be told.

Senator COHEN. Part of the difficulty of our job is that from time to time there are people who are nominated who might not strike either one of us or anybody else in our respective parties in the Senate and the House as a really special person who ought to be filling that position.

I am thinking in terms of Judge Clark. I can recall the howls of protest when Judge Clark came before the Senate confirmation, saying that he was not qualified for the job. On the other hand, it was balanced against the desire to let the President choose his appointees unless they are clearly, either by character or competence, so unqualified for the job that they can't do it. Yet, Judge Clark

was confirmed. He was the Deputy Secretary of State, performing rather well from all that I understood of his position, and then went on to become the National Security Adviser.

And sometimes we are in the position where we don't know. We can say to the President that if you make a bad appointment, that usually is going to in some way be a bad political situation for you. You are judged by the quality of the people that you appoint.

That is the general rule I have tried to follow myself. We are not omniscient. We can question. And a person comes here, and there is a commitment to supporting the act as written, that is all we can expect.

Ms. McBRIDE. I agree, there is always a balance——

Senator COHEN. I don't want to diffuse what you are saying, but the notion that this person who is appointed will be the symbol of whether or not Ronald Reagan believes in ethics in Government has to be put into perspective. It is important, and we will place importance on it. It will be hard to judge.

I don't know what Mr. Walter's background was prior to coming into that position. I am pleased to learn about the background of Mr. Scott from the Justice Department.

We have got to recognize that these are human beings coming in. We have to accept their testimony and try to sift through their statements in cross-examination.

I am satisfied that the administration will be sensitive enough to recognize that we are committed to seeing that the Ethics Act will work.

Ms. McBRIDE. I agree that the committee has shown a commitment to seeing the act work.

Senator LEVIN. Just a comment on the point. The chairman has pointed out that we lose competent people because of our ethical standards, rules of ethics, and disclosure, conflict-of-interest laws, and so forth.

We do lose competent people. I happen to agree with him also that it is worth it. Plenty of others are willing to take on the job, happy to take on the job; in fact, fight like hell to get the job.

Senator COHEN. And spend a lot of money in the process.

Senator LEVIN. I am always amused by people who think they are making a sacrifice for being a U.S. Senator. There are a few hundred million other people out there who would like to make such a sacrifice.

Ms. McBRIDE. I am one of them, Senator. [Laughter.]

Senator COHEN. They are lining up in Michigan right now. [Laughter.]

Senator LEVIN. I thought those were the soup lines.

In any event, we do lose people. Senator Cohen is right. We should not ignore the fact that we lose people by these laws.

It is a fact. There are people who do not want the grief, good people who do not want the grief of the blind trusts, and the screening, and God knows what, subjecting themselves to the kind of public scrutiny that the congressional committees put people through, present and past employees.

There is a price that people pay. Most of our witnesses have done that very gracefully, and I would commend you and the other witnesses for your presentation this morning.

There is a price. Again, I think it is well worth it. We should try to continue to enforce the statute. I think the Directors accorded themselves well.

I do not know if there was a prior Director to Mr. Walter—I should limit it to those two, the two whose records I am familiar with, that we have had in front of us this morning. They have accorded themselves well on their jobs and this morning.

We should not put Directors in that kind of circumstance, where they have got to make judgments on people who can fire them. We don't want to put folks in that position. It is that simple.

I hope this committee will take some leadership on this. We have a chairman who is extremely sensitive to these kinds of issues. He has displayed it over and over again.

We are blessed by having Senator Cohen in this position, who also realizes there are going to be some imbalances involved with this. Credibility of Government is a critical issue. It is not a high priority. That hurts all of us in what we are trying to do.

We have got to try to improve it, and therefore appearances become important, credibility becomes important, as well as the actual factual circumstances.

I want to thank you for your testimony, for your support of some improvements, for your willingness to state what appears to be accurate.

The agencies work well. Nobody is trying to take apart an agency. We are trying to strengthen it, not in any way diminish its importance or effect, and your support for improvements I think will also be helpful.

Ms. McBRIDE. Senator Levin and Senator Cohen, we stand ready to help in any way that we can in terms of the reauthorization and in trying to strengthen and improve what we think is a good and effective agency.

Senator COHEN. Thank you very much.

[Ms. McBride's prepared statement follows:]

PREPARED STATEMENT OF ANN McBRIDE, VICE PRESIDENT FOR PROGRAM OPERATIONS, COMMON CAUSE

Mr. Chairman, Members of the Subcommittee, I am Ann McBride, Vice President for Program Operations of Common Cause. I appreciate the opportunity to testify here today in support of the reauthorization of the Office of Government Ethics (OGE).

Mr. Chairman, you, Senator Levin and this Committee are to be commended for the leadership you provided in the last Congress in successfully extending the Special Prosecutor provision of the Ethics in Government Act. Your timely start on the reauthorization of OGE should enable the Congress and the President to complete action on this important matter prior to the termination of the present authorization on September 30. We appreciate your constructive attention to these ethics issues and we look forward to working with you.

Common Cause believes that in the five years since its passage, the Ethics in Government Act has worked well. Recent activities at the Environmental Protection Agency make clear once again why this and other laws which protect against conflict of interest continue to be necessary.

We believe that the Ethics in Government Act has fulfilled its primary purpose of reducing conflicts of interest. The major provisions of the Act -- public financial disclosure, revolving door provisions and the Office of Government Ethics, as well as the Special Prosecutor provision -- established new rules and procedures that have enhanced the integrity of the institutions of government. In addition, the Ethics Act of 1978 has caused government and public officials to treat seriously -- perhaps for the first time -- conflict of interest statutes, orders and

regulations that have been on the books for years. Requirements for public financial disclosure and the creation of the Office of Government Ethics have combined to help conflict of interest laws -- often in the past simply ignored -- to be dealt with forthrightly.

Mr. Chairman, we also believe that the Ethics in Government Act has enhanced public service. Without clear ethics laws and protection against conflict of interest, the lowest common denominator is allowed to set the standard for the institution. It cannot be too heavily stressed that the Act was not passed simply for the convenience of top government officials but rather to protect the American people against potential and real conflicts by government officials, against officials using public office for private gain.

Common Cause believes that the Ethics in Government Act continues to serve the public interest well. While some fine-tuning may be in order, it is clear that the Office of Government Ethics should be reauthorized and that no meaningful case has been made for weakening the Act.

OFFICE OF GOVERNMENT ETHICS

Since its establishment in 1978, the Office of Government Ethics has served as the administrator of the executive branch ethics program. While much enforcement remains decentralized on an agency-by-agency basis, the establishment of an office with overall responsibility for ethics enforcement is a crucial step in ensuring government integrity. Common Cause believes that the Office of Government Ethics has performed well in fulfilling its

mandate and should be reauthorized. The OGE deserves public and Congressional endorsement and we will work vigorously to secure both.

One area where the OGE has made a vital contribution is in the confirmation process. In the final years of the Carter administration, during the Reagan transition and in subsequent confirmations, the OGE has reviewed the financial disclosure statements of Presidential nominees and, after working out the necessary adjustments and agreements, certified to the Senate that nominees are in compliance with ethics laws and regulations.

This procedure has become such a central part of the confirmation process that, according to former OGE Director Jack Walter, ". . . each committee of the Senate now refrains from reporting presidential nominees for confirmation prior to receipt of assurance from the Office of Government Ethics that the nominees will be able to assume office legally uncompromised by their personal financial interests."

We believe that public confidence in this and other OGE activities is closely related to the independence the office has in making findings free from political interference. We therefore believe that the statute should protect against potential political interference by giving the position of OGE Director a fixed tenure rather than the present relationship of service at the pleasure of the President.

As you know, Mr. Chairman, the position of OGE Director is now vacant. We believe that the effectiveness of the Office has been in no small measure due to the commitment of the previous

Directors to the mandate of the OGE, to Ethics laws and regulations and to the fundamental goal of a government where public office is not used for private gain.

This nomination becomes a key test for the Reagan administration, which has had far from a stellar record on matters of conflict of interest. In the past two years, significant questions have been raised about a number of officials, including the Attorney General, the Director of the CIA and, most recently, appointees at the Environmental Protection Agency. In addition, top level officials at the White House, including former Personnel Director Pendleton James and Counsel Fred Fielding, have been highly critical of the Ethics in Government Act and have advanced proposals that would gut the law. In this context, it is particularly incumbent on President Reagan to nominate a person of unquestioned integrity who is fully committed to the mission of the Office of Government Ethics and who will actively and vigorously implement existing Ethics laws and regulations.

This nomination will, of course, come before this committee. We believe that you should not recommend confirmation unless the nominee clearly meets these standards.

In addition, Mr. Chairman, we are concerned about the short length of time -- five years -- of the proposed reauthorization. Common Cause has supported Sunset legislation in which all agencies, programs and tax expenditures would be reviewed and subject to automatic termination every ten years unless affirmatively reauthorized. As you know, comprehensive Sunset legislation has not passed the Congress and the "Sunset" concept has

been used instead to single out certain agencies or programs, often those which are controversial, unpopular, or without an outside constituency. If the Sunset concept is to be used with the Office of Government Ethics, we believe that the duration of the reauthorization should be ten, rather than five, years.

Finally, we support the recommendation of the Office of Government Ethics that the Act be amended to clarify OGE's exclusive jurisdiction in implementing regulations concerning standards of conduct in the executive branch.

Public Financial Disclosure

At the heart of the Ethics Act is the requirement for public financial disclosure. After several years of experience under the Act, we firmly conclude that the disclosure provisions have proved to be reasonable, balanced and to have worked well.

On the average 11,000 disclosure forms are filed yearly with little commotion. It appears that, for the most part, disclosure requirements have become an accepted part of public service.

Certainly there is no credible evidence that financial disclosure requirements have in any significant way discouraged otherwise willing individuals from entering government service or caused quality personnel to leave federal service. The results of a study by the Office of Personnel Management showed that of 162 respondents, only 8% cited public financial disclosure among the top five reasons for leaving government.

During legislative consideration of the Ethics Act, Common Cause worked vigorously to balance the privacy rights of the public official against the disclosure necessary to guard against

conflict of interest. For example, we strongly opposed efforts to require disclosure of income tax returns and have consistently opposed disclosure of net worth. In fact, Common Cause was among those which proposed disclosing in categories of values instead of specific dollar amounts.

But while we strongly fought against requiring too much disclosure, we will fight just as hard to prevent too little disclosure. We believe that the changes in the disclosure provisions advocated by some Reagan Administration appointees would severely undermine the Act to the detriment of the public trust.

"Confidential" Disclosure

Common Cause is strongly opposed to any attempts to weaken the Act by requiring only confidential financial disclosure. By reason and definition, "confidential" disclosure is not disclosure at all. The ability for the public and press to have direct access to the disclosed information has prompted much more serious attention to the Act's requirements by those concerned. Public disclosure is an action-forcing mechanism for designated agency officials and others to actively apply the law. General Accounting Office studies before the passage of the Ethics in Government Act found widespread non-compliance with existing conflict of interest regulations under the system of confidential disclosure then in effect.

It should be remembered that it was the public disclosure of Attorney General William French Smith's $50,000 severance arrangement from a firm in California that raised the serious

question of the impropriety of such an arrangement. In short, public disclosure forces the law to be taken seriously.

Eliminating Public Disclosure for Civil Servants GS 16 and Above

For many of these same reasons, Common Cause would also strongly oppose any efforts to eliminate public financial disclosure by career civil servants covered by the Act. Top-level civil servants -- GS 16 and above, the so-called "Supergrades" -- often exercise as much decision-making responsibility as some political appointees. And because the public spotlight is much less focused on career employees, public disclosure to protect against conflicts of interest is clearly needed.

We believe the public interest is best protected by establishing, as the Act currently does, a broad objective standard for those who should logically disclose. The number of those required to file under this system is relatively small. Approximately 11,000 employees (including both civil service employees and political appointees) of 2.1 million civilian government employees are required to disclose under the Act -- less than one-half of one percent.

Obviously under an objective standard some individuals will be required to file who perhaps under another standard should not, while others who should be required to disclose could possibly escape coverage. But we believe that benefits of establishing an objective system are clearly borne out by the difficulty OGE has faced with establishing a position-by-position designation for coverage under the revolving door provision.

To eliminate public disclosure by civil servants would be to ignore the reality that top-level civil servants exercise important authority in government and thus have a high potential for conflicts of interest. It would also mean that the function public disclosure serves as a unifying enforcement mechanism would be abandoned.

Limiting Information to be Disclosed. Common Cause strongly opposes proposals that would significantly weaken financial disclosure by requiring disclosure only of the identity of the financial interest without having to specify value. The legislative history of the Ethics Act underscores the need for a sufficient number of categories of value to reflect the magnitude of a holding and thus the potential magnitude of a conflict of interest. Categories of value, such as those contained in the existing law, are necessary for the public, the press and the Office of Government Ethics to discern the significance of the holdings or transactions being disclosed. Attorney General Smith's severance fee from a California corporation takes on special significance when one knows that the amount is $50,000 -- more than he made during the entire six years he served on the board of directors.

Improving Enforcement Through Random Audits. Common Cause supports strengthening enforcement through the addition of random audits of financial disclosure statements, similar to those used by the IRS for tax returns. The prospect of a random audit would be a strong additional incentive to disclose promptly, accurately and completely, and would give OGE an additional tool with which

to oversee the Ethics program and to check compliance. We also support a system of random audits for congressional and judicial branch disclosures.

Post-Employment Restrictions

No proposal caused as much controversy during congressional consideration of the Ethics Act as the revolving door provision establishing a one-year ban on top-level officials contacting their former agencies. This one-year cooling-off period was a wholly new provision added to existing revolving door restrictions which were also strengthened by the Ethics Act.

Despite gloomy warnings that the revolving door provisions would drive people out of government service, there has been no evidence that significant numbers of individuals have declined to enter government service, or have left government service, because of the Ethics Act restrictions.

There are clearly legitimate and nettlesome administrative problems associated with the current method of designating coverage of the one-year ban on a position-by-position basis. The administrative problems, however, should not become a justification for cutting back on those covered by the revolving door provisions. We would be pleased to work with OGE and with Members of Congress to help devise an objective system that protects the one-year ban while simplifying its administration.

Common Cause supported the one-year ban as a reasonable compromise in lieu of more stringent proposals to limit a former official's employment after leaving government. During congressional consideration, the original scope of those covered by the

provision was significantly narrowed. We believe that further narrowing of the coverage would be an unacceptable weakening of the provision and should be strongly opposed.

Blind Trusts

Common Cause believes that the provisions in the Ethics Act for the use of blind trusts by government officials was a creative and necessary step in offering alternatives for dealing with conflicts of interest. Blind trusts which had been used over the years in an ad hoc way very often had 20/20 vision and did little more than give the illusion of separating the public official from potential conflict of interest. That is why clear rules in this area are extremely important.

Common Cause believes that experience in the complicated area of blind trusts suggests that some fine-tuning may well be undertaken. Proposals to change the provisions, however, should be tempered by the realization that other acceptable mechanisms exist for addressing potential conflicts between financial interests and official duties, including disqualification and divestiture. In any attempt to examine the trust provision for changes, it is important to separate the valid concerns about the present mechanism from overstated or misguided complaints. Any changes should be made within careful guidelines and consistent with the spirit of the provision enacted.

One area where there seems to be concerns that should be examined is the area of so-called "old family trusts." Another is whether the requirements for a trustee are adequate to guarantee true independence.

A closely related issue is the question of the adverse tax consequences of the disposal of assets necessary to comply with conflict of interest laws upon entering government service. Attention should be given to whether it is possible and workable to minimize such a financial penalty for entering public service. Care must be taken, however, to assure that government service does not become a temporary "safe harbor" to be used to avoid normal capital gains or other taxes that would be due upon sale of assets built up over a number of years while in private employment.

No support should be given to the notion that officials should be allowed to take a more active role in the management of the assets held in trust. The argument has been raised that this is necessary for the official to maximize the source of private funds that he may draw upon to supplement a public salary that may be significantly lower than former pay levels in private industry. Although a large disparity between public and private salaries may be inevitable for some individuals, it is not the purpose of the Ethics Act to address that problem. The direct way to address that problem is to adjust public salaries, as Common Cause has consistently advocated, not to open the door to sharply increased potential for conflicts of interest.

Conclusion

Shrill cries at the time of passage of the Ethics in Government Act predicted grave consequences: kidnappings, relatives and friends lining up outside government offices to examine disclosures, difficulty of those leaving high level posts in

finding employment, inability to recruit for government service, and a vastly reduced pool of government employees. These fears have not materialized.

In fact, despite the allegations of many in the Reagan administration that the Ethics Act has hurt recruitment, White House Counsel Fred Fielding admitted at a 1981 OGE conference, ". . . To be fully honest about the whole thing, we do not know how many people used the Act in their conversations with us as an excuse because, although they were flattered to be asked, they did not want to accept for another reason, probably financial."

Even those who are most vocal in criticizing the Act's requirements often conclude that government service is well worth pursuing. I was struck by an article which appeared in Dun's Business Month, which for several pages quoted officials criticizing the blind trust provisions of the Ethics Act. Yet, the final paragraph began, "Moreover, most office holders claim that the advantages and pleasures of serving outweigh the sacrifices." The article concluded with quotes from some of the same people who were earlier criticizing the Act. One former official said, "In spite of the hassles, there's not a moment I have regretted." Attorney General William French Smith -- who certainly has felt the full impact of the Ethics Act -- was quoted in The Washington Post saying: "Sure, it's worth it. Good grief, this is an important public service. It's the kind of thing one both wants to and should do from time to time. It's been an interesting adjustment -- for a lot of reasons. But it has a fascination that doesn't exist in private life."

Government service is and should be rewarding. It is for this reason that Common Cause has consistently supported -- and continues to support -- appropriate increases in pay for government officials. The failure of Congress over the years to deal responsibly with the pay question has had a profoundly detrimental effect on government. And while only a small percentage of people cite the Ethics Act as a major reason for leaving government, the pay question is clearly driving people out of public service. The results of an Office of Personnel Management survey showed that out of 162 respondents, more than fifty percent cited the cap on salaries as among the top five reasons for leaving government. This is compared to eight percent who cited public financial disclosure and twelve percent who cited revolving door provisions among their top five reasons for leaving government.

The Congress finally acted late in the lame duck session last year to raise the pay levels of top government officials. The Senate's refusal to accept a pay raise for itself, however, cannot be reassuring to those officials who ought to be able to expect that fair and regular pay adjustments will be provided in the future. Additionally, the Senate's decision to rely, instead, on honoraria with no overall limit to supplement official salaries sets an unfortunately low ethical standard. Honoraria from those who have an interest in legislation before the Congress present real problems of conflict of interest and special interest influence. Lifting the limit on honoraria has vastly increased this problem. Common Cause believes the Senate should act to reinstate an overall limit on honoraria.

In conclusion, we believe that the Office of Government Ethics should be reauthorized, that the Act has worked well and that, while some fine-tuning may be in order, no case has been made for weakening it. We stand ready to work with this Committee in any way we can.

Senator COHEN. We will adjourn.

We will wait 30 days for additional comments or statements, and we may have questions to direct to the witnesses that we would like you to respond to in that time.

[Whereupon, at 12:14 p.m., the hearing was adjourned.]

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

98TH CONGRESS
1ST SESSION

S. 461

To extend the authorization of appropriations for the Office of Government Ethics for five years.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 3 (legislative day, JANUARY 25), 1983

Mr. COHEN introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

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A BILL

To extend the authorization of appropriations for the Office of Government Ethics for five years.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 405 of the Ethics in Government Act of 1978 (Public Law 95–521) is amended in clause (2) by striking out "four" and inserting in lieu thereof "nine".

TITLES II AND IV OF THE ETHICS IN GOVERNMENT ACT OF 1978

TITLE II—EXECUTIVE PERSONNEL FINANCIAL DISCLOSURE REQUIREMENTS

PERSONS REQUIRED TO FILE

SEC. 201. (a) Within thirty days of assuming the position of an officer or employee described in subsection (f), an individual shall file a report containing the information described in section 202(b) unless the individual has left another position described in subsection (f) within thirty days prior to assuming such new position or has already filed a report under this title with respect to nomination for the new position or as a candidate for the position.

(b) Within five days of the transmittal by the President to the Senate of the nomination of an individual (other than an individual covered by section 301(b) or an individual nominated for appointment to a grade or rank in the uniformed services for which the pay grade prescribed by section 201 of title 37, United States Code, is O–6 or below) to a position, appointment to which requires the advice and consent of the Senate, such individual shall file a report containing the information described in section 202(b). Nothing in this Act shall prevent any Congressional committee from requesting, as a condition of confirmation, any additional financial information from any Presidential nominee whose nomination has been referred to that committee.

(c) Within thirty days of becoming a candidate in a calendar year for nomination or election to the office of President or Vice President, as determined by the Federal Election Commission, or on or before May 15 of that calendar year, whichever, is later and on or before May 15 of each successive year an individual continues to be a candidate, an individual other than an incumbent President or Vice President shall file a report containing the information described in section 202(b). Notwithstanding the preceding sentence, in any calendar year in which an individual continues to be a candidate for any office but all elections for such office relating to such candidacy were held in prior calendar years, such individual need not file a report unless he becomes a candidate for another vacancy in that office or another office during that year.

(d) Any individual who is an officer or employee described in subsection (f) during any calendar year and performs the duties of his position or office for a period in excess of sixty days in that calendar year shall file on or before May 15 of the succeeding year a report containing the information described in section 202(a).

(e) Any individual who occupies a position described in subsection (f) shall, on or before the thirtieth day after termination of employment in such position, file a report containing the information described in section 202(a) covering the preceding calendar year if the report required by subsection (d) has not been filed and covering the portion of the calendar year in which such termination occurs up to the date the individual left such office or position, unless such individual has accepted employment in another position described in subsection (f).

(f) The officers and employees referred to in subsections (a), (d), and (e) are—

(1) the President;

(2) the Vice President;

(3) each officer or employee in the executive branch, including a special Government employee as defined in section 202 of title 18, United States Code, whose position is classified at GS–16 or above of the General Schedule prescribed by section 5332 of title 5, United States Code, or the rate of basic pay for which is fixed (other than under the General Schedule) at a rate equal to or greater than the minimum rate of basic pay fixed for GS–16; each member of a uniformed service whose pay grade is at or in excess of O–7 under section 201 of title 37, United States Code; and each officer or employee in any other position determined by the Director of the Office of Government Ethics to be of equal classification;

(4) each employee appointed pursuant to section 3105 of title 5, United States Code;

(5) any employee not described in paragraph (3) who is in a position in the executive branch which is excepted from the competitive service by reason of being of a confidential or policymaking character, except that the Director of the Office of Government Ethics may, by regulation, exclude from the application of this paragraph any individual, or group of individuals, who are in such positions, but only in cases in which the Director determines such exclusion would not affect adversely the integrity of the Government or the public's confidence in the integrity of the Government;

(6) the Postmaster General, the Deputy Postmaster General, each Governor of the Board of Governors of the United States Postal Service and each officer or employee of the United States Postal Service or Postal Rate Commission whose basic rate of pay is equal to or greater than the minimum rate of basic pay fixed for GS–16; and

(7) the Director of the Office of Government Ethics and each designated agency official.

(g) Reasonable extensions of time for filing any report may be granted under procedures prescribed by the Director of the Office of Government Ethics, but the total of such extensions shall not exceed ninety days.

(h) The provisions of subsections (a), (b), and (e) shall not apply to an individual who, as determined by the designated agency official or Secretary concerned (or in the case of a Presidential appointee under subsection (b), the Director of the Office of Government Ethics), is not reasonably expected to perform the duties of his office or position for more than sixty days in a calendar year, except that if such individual performs the duties of his office or position for more than sixty days in a calendar year—

(1) the report required by subsections (a) and (b) shall be filed within fifteen days of the sixtieth day, and

(2) the report required by subsection (e) shall be filed as provided in such subsection.

(i) The Director of the Office of Government Ethics may grant a publicly available request for a waiver of any reporting requirement under this section for an individual who is expected to perform or has

performed the duties of his office or position less than one hundred and thirty days in a calendar year, but only if the Director determines that—

(1) such individual is not a full-time employee of the Government,

(2) such individual is able to provide services specially needed by the Government,

(3) it is unlikely that the individual's outside employment or financial interests will create a conflict of interest, and

(4) public financial disclosure by such individual is not necessary in the circumstances.

CONTENTS OF REPORTS

SEC. 202. (a) Each report filed pursuant to section 201(d) shall include a full and complete statement with respect to the following:

(1)(A) The source, type, and amount or value of income (other than income referred to in subparagraph (B)) from any source (other than from current employment by the United States Government), and the source, date, and amount of honoraria from any source, received during the preceding calendar year, aggregating $100 or more in value.

(B) The source and type of income which consists of dividends, rents, interest, and capital gains, received during the preceding calendar year which exceeds $100 in amount or value, and an indication of which of the following categories the amount or value of such item of income is within:

(i) not more than $1,000,

(ii) greater than $1,000 but not more than $2,500,

(iii) greater than $2,500 but not more than $5,000,

(iv) greater than $5,000 but not more than $15,000,

(v) greater than $15,000 but not more than $50,000,

(vi) greater than $50,000 but not more than $100,000, or

(vii) greater than $100,000.

(2)(A) The identity of the source and a brief description of any gifts of transportation, lodging, food, or entertainment aggregating $250 or more in value received from any source other than a relative of the reporting individual during the preceding calendar year, except that any food, lodging, or entertainment received as personal hospitality of any individual need not be reported, and any gift with a fair market value of $35 or less need not be aggregated for purposes of this subparagraph.

(B) The identity of the source, a brief description, and the value of all gifts other than transportation, lodging, food, or entertainment aggregating $100 or more in value received from any source other than a relative of the reporting individual during the preceding calendar year, except that any gift with a fair market value of $35 or less need not be aggregated for purposes of this subparagraph.

(C) The identity of the source and a brief description of reimbursements received from any source aggregating $250 or more in value and received during the preceding calendar year.

(D) In an unusual case, a gift need not be aggregated under

subparagraph (A) or (B) if a publicly available request for a waiver is granted.

(3) The identity and category of value of any interest in property held during the preceding calendar year in a trade or business, or for investment or the production of income, which has a fair market value which exceeds $1,000 as of the close of the preceding calendar year, excluding any personal liability owed to the reporting individual by a relative or any deposits aggregating $5,000 or less in a personal savings account. For purposes of this paragraph, a personal savings account shall include any certificate of deposit or any other form of deposit in a bank, savings and loan association, credit union, or similar financial institution.

(4) The identity and category of value of the total liabilities owed to any creditor other than a relative which exceed $10,000 at any time during the preceding calendar year, excluding—

(A) any mortgage secured by real property which is a personal residence of the reporting individual or his spouse; and

(B) any loan secured by a personal motor vehicle, household furniture, or appliances, which loan does not exceed the purchase price of the item which secures it.

With respect to revolving charge accounts, only those with an outstanding liability which exceeds $10,000 as of the close of the preceding calendar year need be reported under this paragraph.

(5) Except as provided in this paragraph, a brief description, the date, and category of value of any purchase, sale, or exchange during the preceding calendar year which exceeds $1,000—

(A) in real property, other than property used solely as a personal residence of the reporting individual or his spouse; or

(B) in stocks, bonds, commodities futures, and other forms of securities.

Reporting is not required under this paragraph of any transaction solely by and between the reporting individual, his spouse, or dependent children.

(6)(A) The identity of all positions held on or before the date of filing during the current calendar year (and, for the first report filed by an individual, during the two-year period preceding such calendar year) as an officer, director, trustee, partner, proprietor, representative, employee, or consultant of any corporation, company, firm, partnership, or other business enterprise, any nonprofit organization, any labor organization, or any educational or other institution other than the United States. This subparagraph shall not require the reporting of positions held in any religious, social, fraternal, or political entity and positions solely of an honorary nature.

(B) If any person, other than the United States Government, paid a nonelected reporting individual compensation in excess of $5,000 in any of the two calendar years prior to the calendar year during which the individual files his first report under this title, the individual shall include in the report—

(i) the identity of each source of such compensation; and

(ii) a brief description of the nature of the duties performed or services rendered by the reporting individual for each such source.

The preceding sentence shall not require any individual to include in such report any information which is considered confidential as a result of a privileged relationship, established by law, between such individual and any person nor shall it require an individual to report any information with respect to any person for whom services were provided by any firm or association of which such individual was a member, partner, or employee unless such individual was directly involved in the provision of such services.

(7) A description of the date, parties to, and terms of any agreement or arrangement with respect to (A) future employment; (B) a leave of absence during the period of the reporting individual's Government service; (C) continuation of payments by a former employer other than the United States Government; and (D) continuing participation in an employee welfare or benefit plan maintained by a former employer.

(b) Each report filed pursuant to subsections (a), (b), and (c) of section 201 shall include a full and complete statement with respect to the information required by—

(1) paragraph (1) of subsection (a) for the year of filing and the preceding calendar year,

(2) paragraphs (3) and (4) of subsection (a) as of the date specified in the report but which is less than thirty-one days before the filing date, and

(3) paragraphs (6) and (7) of subsection (a) of as the filing date but for periods described in such paragraphs.

(c) In the case of any individual described in section 201(e), any reference to the preceding calendar year shall be considered also to include that part of the calendar year of filing up to the date of the termination of employment.

(d)(1) The categories for reporting the amount or value of the items covered in paragraphs (3), (4), and (5) of subsection (a) are as follows:

(A) not more than $5,000;
(B) greater than $5,000 but not more than $15,000;
(C) greater than $15,000 but not more than $50,000;
(D) greater than $50,000 but not more than $100,000;
(E) greater than $100,000 but not more than $250,000; and
(F) greater than $250,000.

(2) For the purposes of paragraph (3) of subsection (a) if the current value of an interest in real property (or an interest in a real estate partnership) is not ascertainable without an appraisal, an individual may list (A) the date of purchase and the purchase price of the interest in the real property, or (B) the assessed value of the real property for tax purposes, adjusted to reflect the market value of the property used for the assessment if the assessed value is computed at less than 100 percent of such market value, but such individual shall include in his report a full and complete description of the method used to determine such assessed value, instead of specifying a category of value pursuant to paragraph (1) of this subsection. If the current value of any other item required to be reported under paragraph (3) of subsection (a) is not ascertainable without an appraisal, such individual may list the book value of a corporation

whose stock is not publicly traded, the net worth of a business partnership, the equity value of an individually owned business, or with respect to other holdings, any recognized indication of value, but such individual shall include in his report a full and complete description of the method used in determining such value. In lieu of any value referred to in the preceding sentence, an individual may list the assessed value of the item for tax purposes, adjusted to reflect the market value of the item used for the assessment if the assessed value is computed at less than 100 percent of such market value, but a full and complete description of the methods used in determining such assessed value shall be included in the report.

(e)(1) Except as provided in the last sentence of this paragraph, each report required by subsection (a), (b), or (c) shall also contain information listed in paragraphs (1) through (5) of subsection (a) respecting the spouse or dependent child of the reporting individual as follows:

(A) The source of items of earned income earned by a spouse from any person which exceed $1,000 and, with respect to a spouse or dependent child, all information required to be reported in subsection (a) (1) ()B with respect to income derived from any asset held by the spouse or dependent child and reported pursuant to paragraph (3). With respect to earned income, if the spouse is self-employed in business or a profession, only the nature of such business or profession need be reported.

(B) In the case of any gifts received by a spouse which are not received totally independent of the spouse's relationship to the reporting individual, the identity of the source and a brief description of gifts of transportation, lodging, food, or entertainment and a brief description and the value of other gifts.

(C) In the case of any reimbursements received by a spouse which are not received totally independent of the spouse's relationship to the reporting individual, the identity of the source and a brief description of each such reimbursement.

(D) In the case of items described in paragraphs (3) through (5), all information required to be reported under these paragraphs other than items (i) which the reporting individual certifies represent the spouse's or dependent child's sole financial interest or responsibility and which the reporting individual has no knowledge of, (ii) which are not in any way, past or present, derived from the income, assets or activities of the reporting individual, and (iii) from which the reporting individual neither derives, nor expects to derive, any financial or economic benefit.

Each report referred to in subsection (b) of this section shall, with respect to the spouse and dependent child of the reporting individual, only contain information listed in paragraphs (1), (3), and (4) of subsection (a), as specified in this paragraph.

(2) No report shall be required with respect to a spouse living separate and apart from the reporting individual with the intention of terminating the marriage or providing for permanent separation; or with respect to any income or obligations of an individual arising from the dissolution of his marriage or the permanent separation from his spouse.

(f) (1) Except as provided in paragraph (2), each reporting individual shall report the information required to be reported pursuant

to subsection (a), (b), and (c) of this section with respect to the holdings of and the income from a trust or other financial arrangement from which income is received by, or with respect to which a beneficial interest in principal or income is held by, such individual, his spouse, or any dependent child.

(2) A reporting individual need not report the holdings of or the source of income from any of the holdings of—

(A) any qualified blind trust (as defined in paragraph (3)); or

(B) a trust—

(i) which was not created directly by such individual, his spouse, or any dependent child, and

(ii) the holdings or sources of income of which such individual, his spouse, and any dependent child have no knowledge of,

but such individual shall report the category of the amount of income received by him, his spouse, or any dependent child from the trust under subsection (a)(1)(B) of this subsection.

(3) For purposes of this subsection, the term "qualified blind trust" includes any trust in which a reporting individual, his spouse, or any dependent child has a beneficial interest in the principal or income, and which meets the following requirements:

(A) The trustee of the trust is a financial institution, an attorney, a certified public accountant, a broker, or an investment adviser (who in the case of a financial institution or investment company, any officer or employee involved in the management or control of the trust who)—

(i) is independent of and unassociated with any interested party so that the trustee cannot be controlled or influenced in the administration of the trust by any interested party,

(ii) is not or has not been an employee of any interested party, or any organization affiliated with any interested party and is not a partner of, or involved in any joint venture or other investment with, any interested party, and

(iii) is not a relative of any interested party.

(B) Any asset transferred to the trust by an interested party is free of any restriction with respect to its transfer or sale unless such restriction is expressly approved by the supervising ethics office of the reporting individual.

(C) The trust instrument which establishes the trust provides that—

(i) except to the extent provided in subparagraph (B) of this paragraph, the trustee in the exercise of his authority and discretion to manage and control the assets of the trust shall not consult or notify any interested party;

(ii) the trust shall not contain any asset the holding of which by an interested party is prohibited by any law or regulation;

(iii) the trustee shall promptly notify the reporting individual and his supervising ethics office when the holdings of any particular asset transferred to the trust by any interested party are disposed of or when the value of such holding is less than $1,000;

(iv) the trust tax return shall be prepared by the trustee or his designee, and such return and any information relating thereto (other than the trust income summarized in appropriate categories necessary to complete an interested party's tax return), shall not be disclosed to any interested party;

(v) an interested party shall not receive any report on the holdings and sources of income of the trust, except a report at the end of each calendar quarter with respect to the total cash value of the interest of the interested party in the trust or the net income or loss of the trust or any reports necessary to enable the interested party to complete an individual tax return required by law or to provide the information required by subsection (a)(1)(B) of this section, but such report shall not identify any asset or holding;

(vi) except for communications which solely consist of requests for distributions of cash or other unspecified assets of the trust, there shall be no direct or indirect communication between the trustee and an interested party with respect to the trust unless such communication is in writing and unless it relates only (I) to the general financial interest and needs of the interested party (including, but not limited to, an interest in maximizing income or long-term capital gain), (II) to the notification of the trustee of a law or regulation subsequently applicable to the reporting individual which prohibits the interested party from holding an asset, which notification directs that the asset not be held by the trust, or (III) to directions to the trustee to sell all of an asset initially placed in the trust by an interested party which in the determination of the reporting individual creates a conflict of interest or the appearance thereof due to the subsequent assumption of duties by the reporting individual (but nothing herein shall require any such direction); and

(vii) the interested parties shall make no effort to obtain information with respect to the holdings of the trust, including obtaining a copy of any trust tax return filed or any information relating thereto except as otherwise provided in this subsection.

(D) The proposed trust instrument and the proposed trustee is approved by the reporting individual's supervising ethics office. For purposes of this subsection, "interested party" means a reporting individual, his spouse, and any dependent child if the reporting individual, his spouse, or dependent child has a beneficial interest in the principal or income of a qualified blind trust; "broker" has the meaning set forth in section 3(a)(4) of the Securities and Exchange Act of 1934 (15 U.S.C. 78c(a)(4)); investment adviser includes any investment adviser who, as determined under regulations prescribed by the supervising ethics office, is generally involved in his role as such an adviser in the management or control of trusts; and "supervising ethics office" means the Office of Government Ethics.

(4)(A) An asset placed in a trust by an interested party shall be considered a financial interest of the reporting individual, for the purposes of section 208 of title 18, United States Code, and any other conflict of interest statutes or regulations of the Federal Government,

until such time as the reporting individual is notified by the trustee that such asset has been disposed of, or has a value of less than $1,000.

(B) The provisions of subparagraph (A) shall not apply with respect to a trust created for the benefit of a reporting individual appointed to office by the President, by and with the consent of the Senate, or the spouse, dependent child, or minor child of such a person, if—

(i) the Director of the Office of Government Ethics, in concurrence with the Attorney General, finds that—

(I) the assets placed in the trust consist of a well-diversified portfolio of readily marketable securities;

(II) none of the assets consist of securities of entities having substantial activities in the area of the reporting individual's primary area of responsibility;

(III) the trust instrument prohibits the trustee, notwithstanding the provisions of paragraphs (3)(C)(iii) and (iv) of this subsection, from making public or informing any interested party of the sale of any securities;

(IV) the trustee is given power of attorney, notwithstanding the provisions of paragraph (3)(C)(v) of this subsection, to prepare on behalf of any interested party the personal income tax returns and similar returns which may contain information relating to the trust; and

(V) except as otherwise provided in this paragraph, the trust instrument provides (or in the case of a trust established prior to the effective date of this Act which by its terms does not permit amendment, the trustee, the reporting individual, and any other interested party agree in writing) that the trust shall be administered in accordance with that requirements of this subsection and the trustee of such trust meets the requirements of paragraph (3)(A); and

(ii) the reporting individual (other than an individual who is in such an office at the time of enactment of this Act and has an existing trust which is a good faith attempt to create a blind trust) has informed the Congressional committee considering his nomination at the time his financial disclosure statement is filed with the Committee of his intention to comply with this paragraph.

(5)(A) The reporting individual shall, within thirty days after a qualified blind trust is approved by his supervising ethics office, file with such office a copy of—

(i) the executed trust instrument of such trust (other than those provisions which relate to the testamentary disposition of the trust assets), and

(ii) a list of the assets which were transferred to such trust, including the category of value of each asset as determined under subsection (d) of this section.

(B) The reporting individual shall, within thirty days of transferring an asset (other than cash) to a previously established qualified blind trust, notify his supervising ethics office of the identity of each such asset and the category of value of each asset as determined under subsection (d) of this section.

(C) Within thirty days of the dissolution of a qualified blind trust, a reporting individual shall—

(i) notify his supervising ethics office of such dissolution, and

(ii) file with such office a copy of a list of the assets of the trust at the time of such dissolution and the category of value under subsection (d) of this section of each such asset.

(D) Documents filed under subparagraphs (A), (B), and (C) of this paragraph and the lists provided by the trustee of assets placed in the trust by an interested party which have been sold shall be made available to the public in the same manner as a report is made available under section 205 and the provisions of that section shall apply with respect to such document and lists.

(E) A copy of each written communication with respect to the trust under paragraph (3)(C)(vi) shall be filed by the person initiating the communication with the reporting individual's supervising ethics office within five days of the date of the communication.

(6)(A) A trustee of a qualified blind trust shall not knowingly or negligently (i) disclose any information to an interested party with respect to such trust that may not be disclosed under paragraph (3) of this subsection, (ii) acquire any holding the ownership of which is prohibited by the trust instrument; (iii) solicit advice from any interested party with respect to such trust, which solicitation is prohibited by paragraph (3) of this subsection or the trust agreement; or (iv) fail to file any document required by this subsection.

(B) A reporting individual shall not knowingly or negligently (i) solicit or receive any information with respect to a qualified blind trust of which he is an interested party that may not be disclosed under paragraph (3)(C) of this subsection or (ii) fail to file any document required by this subsection.

(C)(i) The Attorney General may bring a civil action in any appropriate United States District Court against any individual who knowingly and willfully violates the provisions of subparagraph (A) or (B) of this paragraph. The court in which such action is brought may assess against such individual a civil penalty in any amount not to exceed $5,000.

(ii) The Attorney General may bring a civil action in any appropriate United States District Court against any individual who negligently violates the provisions of subparagraph (A) or (B) of this paragraph. The court in which such action is brought may assess against such individual a civil penalty in any amount not to exceed $1,000.

(7) Any trust which is in existence prior to the date of the enactment of this Act shall be considered a qualified blind trust if—

(A) the supervising ethics office determines that the trust was a good faith effort to establish a blind trust;

(B) the previous trust instrument is amended or, if such trust instrument does not by its terms permit amendment, all parties to the trust instrument, including the reporting individual and the trustee, agree in writing that the trust shall be administered in accordance with the requirements of paragraph (3)(C) and a trustee is (or has been) appointed who meets the requirements of paragraph (3); and

(C) a copy of the trust instrument (except testamentary provisions), a list of the assets previously transferred to the trust by an interested party and the category of value of each such asset

at the time it was placed in the trust, and a list of assets previously placed in the trust by an interested party which have been sold is filed and made available to the public as provided under paragraph (5) of this subsection.

(g) Political campaign funds, including campaign receipts and expenditures, need not be included in any report filed pursuant to this title.

(h) A report filed pursuant to subsection (d) or (e) of section 201 need not contain the information described in subparagraphs (A), (B), and (C) of subsection (a)(2) with respect to gifts and reimbursements received in a period when the reporting individual was not an officer or employee of the Federal Government.

FILING OF REPORTS

SEC. 203. (a) Except as otherwise provided in this subsection, the reports required under this title shall be filed by the reporting individual with the designated agency official at the agency by which he is employed (or in the case of an individual described in section 201(e), was employed) or in which he will serve. The date any report is received (and the date of receipt of any supplemental report) shall be noted on such report by such official.

(b) The President and the Vice President shall file reports required under this title with the Director of the Office of Government Ethics.

(c) Copies of the reports required to be filed under this title by the Postmaster General, the Deputy Postmaster General, the Governors of the Board of Governors of the United States Postal Service, designated agency officials, candidates for the office of President or Vice President and officers and employees in (and nominees to) offices or positions which require confirmation by the Senate or by both Houses of Congress other than those referred to in subsection (f) shall be transmitted to the Director of the Office of Government Ethics. The Director shall forward a copy of the report of each nominee to the congressional committee considering the nomination.

(d) Reports required to be filed under this title by the Director shall be filed in the Office of Government Ethics and, immediately after being filed, shall be made available to the public in accordance with this title.

(e) Each individual identified in section 201(c) shall file the reports required by this title with the Federal Elections Commission.

(f) Reports required of members of the uniformed services shall be filed with the Secretary concerned.

(g) The Office of Government Ethics shall develop and make available forms for reporting the information required by this title.

FAILURE TO FILE OR FALSIFYING REPORTS

SEC. 204. (a) The Attorney General may bring a civil action in any appropriate United States District Court against any individual who knowingly and willfully falsifies or who knowingly or willfully fails to file or report any information that such individual is required to report pursuant to section 202. The court in which such action is brought may assess against such individual a civil penalty in any amount, not to exceed $5,000.

(b) The head of each agency, each Secretary concerned, or the Director of the Office of Government Ethics, as the case may be, shall refer to the Attorney General the name of any individual he has reasonable cause to believe has willfully failed to file a report or has willfully falsified or willfully failed to file information required to be reported.

(c) The President, the Vice President, the Secretary concerned, the head of each agency, and the Office of Personnel Management, may take any appropriate personnel or other action in accordance with applicable law or regulation against any individual failing to file a report or falsifying or failing to report information required to be reported.

CUSTODY OF AND PUBLIC ACCESS TO REPORTS

SEC. 205. (a) Each agency shall make each report filed with it under this title available to the public in accordance with the provisions of subsection (b) of this section, together with a copy of the official position description of the Government office or position held by the reporting individual involved (if available) which shall be added to such report by such individual's designated agency official or by the Secretary concerned, except that this section does not require public availability of the report filed by any individual in the Central Intelligence Agency, the Defense Intelligence Agency, or the National Security Agency, or any individual engaged in intelligence activities in any agency of the United States, if the President finds that, due to the nature of the office or position occupied by such individual, public disclosure of such report would, by revealing the identity of the individual or other sensitive information, compromise the national interest of the United States. In addition, such individuals may be authorized, notwithstanding section 204(a), to file such additional reports as are necessary to protect their identity from public disclosure if the President first finds that such filing is necessary in the national interest.

(b)(1) Each agency shall, within fifteen days after any report is received by the agency under this title, permit inspection of such report by or furnish a copy of such report to any person requesting such inspection or copy. The agency may require a reasonable fee to be paid in any amount which is found necessary to recover the cost of reproduction or mailing of such report excluding any salary of any employee involved in such reproduction or mailing. A copy of such report may be furnished without charge or at a reduced charge if it is determined that waiver or reduction of the fee is in the public interest.

(2) Notwithstanding paragraph (1), a report may not be made available under this section to any person nor may any copy thereof be provided under this section to any person except upon a written application by such person stating—

(A) that person's name, occupation and address;

(B) the name and address of any other person or organization on whose behalf the inspection or copy is requested; and

(C) that such person is aware of the prohibitions on the obtaining or use of the report.

Any such application shall be made available to the public throughout the period during which the report is made available to the public.

(c)(1) It shall be unlawful for any person to obtain or use a report—

(A) for any unlawful purpose;

(B) for any commercial purpose, other than by news and communications media for dissemination to the general public;

(C) for determining or establishing the credit rating of any individual; or

(D) for use, directly or indirectly, in the solicitation of money for any political, charitable, or other purpose.

(2) The Attorney General may bring a civil action against any person who obtains or uses a report for any purpose prohibited in paragraph (1) of this subsection. The court in which such action is brought may assess against such person a penalty in any amount not to exceed $5,000. Such remedy shall be in addition to any other remedy available under statutory or common law.

(d) Any report filed with an agency, or transmitted to the Director of the Office of Government Ethics, pursuant to this title shall be retained by such agency or the Office of Government Ethics, or both, as the case may be. Such report shall be made available to the public for a period of six years after receipt of the report. After such six-year period the report shall be destroyed unless needed in an ongoing investigation, except that in the case of an individual who filed the report pursuant to section 201(b) and was not subsequently confirmed by the Senate, or who filed the report pursuant to section 201(c) and was not subsequently elected, such reports shall be destroyed one year after the individual either is no longer under consideration by the Senate or is no longer a candidate for nomination or election to the Office of President or Vice President unless needed in an ongoing investigation.

REVIEW OF REPORTS

SEC. 206. (a) Each designated agency official or Secretary concerned shall make provisions to ensure that each report filed with him under this title is reviewed within sixty days after the date of such filing, except that the Director of the Office of Government Ethics shall review only those reports transmitted to him under this title within sixty days after the date of transmittal.

(b)(1) If after reviewing any report under subsection (a), the Director of the Office of Government Ethics, Secretary concerned, or designated agency official, as the case may be, is of the opinion that on the basis of information contained in such report the individual submitting such report is in compliance with applicable laws and regulations, he shall state such opinion on the report, and shall sign such report.

(2) If the Director of the Office of Government Ethics, Secretary concerned, or designated agency official, after reviewing any report under subsection (a)—

(A) believes additional information is required to be submitted, he shall notify the individual submitting such report what additional information is required and the time by which it must be submitted, or

(B) is of the opinion, on the basis of information submitted, that the individual is not in compliance with applicable laws and regulations, he shall notify the individual, afford him a reasonable opportunity for a written or oral response, and after consideration of such response, reach an opinion as to whether or not,

on the basis of information submitted, the individual is in compliance with such laws and regulations.

(3) If the Director of the Office of Government Ethics, Secretary concerned, or designated agency official reaches an opinion under paragraph (2)(B) that an individual is not in compliance with applicable laws and regulations, he shall notify the individual of that opinion and, after an opportunity for personal consultation (if practicable), determine and notify the individual of which steps, if any, would in his opinion be appropriate for assuring compliance with such laws and regulations and the date by which such steps should be taken. Such steps may include, as appropriate—

(A) divestiture,

(B) restitution,

(C) the establishment of a blind trust,

(D) request for an exemption under section 208(b) of title 18, United States Code, or

(E) voluntary request for transfer, reassignment, limitation of duties, or resignation.

The use of any such steps shall be in accordance with such regulations as the Director of the Office of Government Ethics or a Secretary concerned, as the case may be, may prescribe.

(4) If steps for assuring compliance with applicable laws and regulations are not taken by the date set under paragraph (3) by an individual in a position (other than in the uniformed services), appointment to which requires the advice and consent of the Senate, the matter shall be referred to the President for appropriate action.

(5) If steps for assuring compliance with applicable laws and regulations are not taken by the date set under paragraph (3) by a member of the uniformed services, the Secretary concerned shall take appropriate action.

(6) If steps for assuring compliance with applicable laws and regulations are not taken by the date set under paragraph (3) by any other officer or employee the matter shall be referred to the head of the appropriate agency for appropriate action; except that in the case of the Postmaster General or Deputy Postmaster General, the Director of the Office of Government Ethics shall recommend to the Governors of the Board of Governors of the United States Postal Service the action to be taken.

(7) For purposes of assisting employees in avoiding situations in which they would not be in compliance with applicable laws and regulations, each Secretary concerned and designated agency official (including the President in the case of the individuals employed in the Executive Office of the President) shall maintain a list of those circumstances or situations which have resulted or may result in noncompliance with such laws or regulations. Such list shall be periodically published, and shall be furnished to those individuals employed within the agency who are required to file reports under this title. The absence of any situation or circumstance from such a list shall not be construed as an indication that an individual in such circumstance or situation would be in compliance with such laws or regulations.

(8) The preceding provisions of this subsection shall not apply in the case of the President or Vice President, or a candidate or nominee for such office.

ADDITIONAL REQUIREMENTS

SEC. 207. (a) The President may require officers and employees in the executive branch (including the United States Postal Service and members of the uniformed services) not covered by this title to submit confidential reports in such form as is required by this title. Subsections (a), (b), and (d) of section 205 shall not apply with respect to any such report.

(b) The Director of the Office of Government Ethics may by rule require disclosure, in the reports filed pursuant to subsections (a) and (c) of section 202, of gifts received by a dependent child of a reporting individual if the information required to be disclosed does not exceed that which must be reported by a spouse of a reporting individual under this title.

(c) The provisions of this title requiring the reporting of information shall supersede any general requirement under any other provision of law or regulation with respect to the reporting of information required for purposes of preventing conflicts of interest or apparent conflicts of interest. Such provisions of this title shall not supersede the requirements of section 7342 of title 5, United States Code.

(d) Nothing in this Act requiring reporting of information shall be deemed to authorize the receipt of income, gifts, or reimbursements; the holding of assets, liabilities, or positions; or the participation in transactions that are prohibited by law, Executive order, or regulation.

AUTHORITY OF COMPTROLLER GENERAL

SEC. 208. The Comptroller General shall have access to financial disclosure reports filed under this title for the purposes of carrying out his statutory responsibilities.

DEFINITIONS

SEC. 209. For the purposes of this title, the term—

(1) "income" means all income from whatever source derived, including but not limited to the following items: compensation for services, including fees, commissions, and similar items; gross income derived from business (and net income if the individual elects to include it); gains derived from dealings in property; interest; rents; royalties; dividends; annuities; income from life insurance and endowment contracts; pensions; income from discharge of indebtedness; distributive share of partnership income; and income from an interest in an estate or trust;

(2) "relative" means an individual who is related to the reporting individual, as father, mother, son, daughter, brother, sister, uncle, aunt, great aunt, great uncle, first cousin, nephew, niece, husband, wife, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, half sister, or who is the grandfather or grandmother of the spouse of the reporting individual, and shall be deemed to include the fiance or fiancee of the reporting individual;

(3) "gift" means a payment, advance, forbearance, rendering, or deposit of money, or any thing of value, unless consideration of equal or greater value is received by the donor, but does not include—

(A) bequest and other forms of inheritance;

(B) suitable mementos of a function honoring the reporting individual;

(C) food, lodging, transportation, and entertainment provided by a foreign government within a foreign country or by the United States Government;

(D) food and beverages consumed at banquets, receptions, or similar events; or

(E) communications to the offices of a reporting individual including subscriptions to newspapers and periodicals;

(4) "honoraria" has the meaning given such term in the Federal Election Campaign Act of 1971.

(5) "value" means a good faith estimate of the dollar value if the exact value is neither known nor easily obtainable by the reporting individual;

(6) "personal hospitality of any individual" means hospitality extended for a nonbusiness purpose by an individual, not a corporation or organization, at the personal residence of that individual or his family or on property or facilities owned by that individual or his family;

(7) "dependent child" means, when used with respect to any reporting individual, any individual who is a son, daughter, stepson, or stepdaughter and who—

(A) is unmarried and under age 21 and is living in the household of such reporting individual; or

(B) is a dependent of such reporting individual within the meaning of section 152 of the Internal Revenue Code of 1954;

(8) "reimbursement" means any payment or other thing of value received by the reporting individual, other than gifts, to cover travel-related expenses of such individual other than those which are—

(A) provided by the United States Government;

(B) required to be reported by the reporting individual under section 7342 of title 5, United States Code; or

(C) required to be reported under section 304 of the Federal Election Campaign Act of 1971 (2 U.S.C. 434);

(9) "Secretary concerned" has the meaning set forth in section 101(8) of title 10, United States Code, and, in addition, means—

(A) the Secretary of Commerce, with respect to matters concerning the National Oceanic and Atmospheric Administration; and

(B) the Secretary of Health, Education, and Welfare, with respect to matters concerning the Public Health Service;

(10) "designated agency official" means an officer or employee who is designated to administer the provisions of this title within an agency; and

(11) "executive branch" includes each Executive agency (as defined in section 105 of title 5, United States Code) and any

other entity or administrative unit in the executive branch unless such agency, entity, or unit is specifically included in the coverage of title I or III of this Act.

OUTSIDE EARNED INCOME

SEC. 210. Except where the employee's agency or department shall have more restrictive limitations on outside earned income, all employees covered by this title who are compensated at a pay grade in the General Schedule of grade 16 or above and who occupy non-judicial full-time positions appointment to which is required to be made by the President, by and with the advice and consent of the Senate, may not have in any calendar year outside earned income attributable to such calendar year which is in excess of 15 percent of their salary.

EFFECTIVE DATE

SEC. 211. The provisions made by this title shall take effect on January 1, 1979, and the reports filed under section 201(d) on May 15, 1979, shall include information for calendar year 1978.

TITLE IV—OFFICE OF GOVERNMENT ETHICS

OFFICE OF GOVERNMENT ETHICS

SEC. 401. (a) There is established in the Office of Personnel Management an office to be known as the Office of Government Ethics.

(b) There shall be at the head of the Office of Government Ethics a Director (hereinafter referred to as the "Director"), who shall be appointed by the President, by and with the advice and consent of the Senate.

AUTHORITY AND FUNCTIONS

SEC. 402. (a) The Director shall provide, under the general supervision of the Office of Personnel Management, overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency, as defined in section 105 of title 5, United States Code.

(b) The responsibilities of the Director shall include—

(1) developing and recommending to the Office of Personnel Management, in consultation with the Attorney General, rules and regulations to be promulgated by the President or the Office of Personnel Management pertaining to conflicts of interest and ethics in the executive branch, including rules and regulations establishing procedures for the filing, review, and public availability of financial statements filed by officers and employees in the executive branch as required by title II of this Act;

(2) developing and recommending to the Office of Personnel Management, in consultation with the Attorney General, rules

and regulations to be promulgated by the President or the Office of Personnel Management pertaining to the identification and resolution of conflicts of interest;

(3) monitoring and investigating compliance with the public financial disclosure requirements of title II of this Act by officers and employees of the executive branch and executive agency officials responsible for receiving, reviewing, and making available financial statements filed pursuant to such title;

(4) conducting a review of financial statements to determine whether such statements reveal possible violations of applicable conflict of interest laws or regulations and recommending appropriate action to correct any conflict of interest or ethical problems revealed by such review;

(5) monitoring and investigating individual and agency compliance with any additional financial reporting and internal review requirements established by law for the executive branch;

(6) interpreting rules and regulations issued by the President or the Office of Personnel Management governing conflict of interest and ethical problems and the filing of financial statements;

(7) consulting, when requested, with agency ethics counselors and other responsible officials regarding the resolution of conflict of interest problems in individual cases:

(8) establishing a formal advisory opinion service whereby advisory opinions are rendered on matters of general applicability or on important matters of first impression after, to the extent practicable, providing interested parties with an opportunity to transmit written comments with respect to the request for such advisory opinion, and whereby such advisory opinions are compiled, published, and made available to agency ethics counselors and the public;

(9) ordering corrective action on the part of agencies and employees which the Director deems necessary;

(10) requiring such reports from executive agencies as the Director deems necessary;

(11) assisting the Attorney General in evaluating the effectiveness of the conflict of interest laws and in recommending appropriate amendments;

(12) evaluating, with the assistance of the Attorney General, the need for changes in rules and regulations issued by the Office of Personnel Management and the agencies regarding conflict of interest and ethical problems, with a view toward making such rules and regulations consistent with and an effective supplement to the conflict of interest laws;

(13) cooperating with the Attorney General in developing an effective system for reporting allegations of violations of the conflict of interest laws to the Attorney General, as required by section 535 of title 28, United States Code;

(14) providing information on and promoting understanding of ethical standards in executive agencies; and

(15) developing and recommending for promulgation by the Office of Personnel Management such rules and regulations as the Director determines necessary or desirable with respect to the evaluation of any item required to be reported by title II of this Act.

(c) In the development of policies, rules, regulations, procedures, and forms to be recommended, authorized, or prescribed by him, the Director shall consult when appropriate with the executive agencies affected and with the Attorney General.

ADMINISTRATIVE PROVISIONS

SEC. 403. Upon the request of the Director, each executive agency is directed to—

(1) make its services, personnel, and facilities available to the Director to the greatest practicable extent for the performance of functions under this Act; and

(2) except when prohibited by law, furnish to the Director all information and records in its possession which the Director may determine to be necessary for the performance of his duties.

SEC. 404. In promulgating rules and regulations pertaining to financial disclosure, conflict of interest, and ethics in the executive branch, the ~~Office of Personnel Management~~ shall issue rules and regulations in accordance with chapter 5 of title 5, United States Code. Any person may seek judical review of any such rule or regulation.

AUTHORIZATION OF APPROPRIATIONS

SEC. 405. There are authorized to be appropriated to carry out the provisions of this title, and for no other purpose—

(1) not to exceed $2,000,000 for the fiscal year ending September 30, 1979; and

(2) not to exceed $2,000,000 for each of the four fiscal years thereafter.

ANNUAL PAY

SEC. 406. Section 5316 of title 5, United States Code, is amended by adding at the end the following new paragraph:

"(146) Director of the Office of Government Ethics.".

Statement of

Senator Jim Sasser

Mr. Chairman, I want to commend you and Senator Levin for undertaking this hearing on S.461, legislation reauthorizing the Office of Government Ethics for another five years.

As one who fought vigorously for strong Ethics in Government legislation in 1977 and 1978, and as one who supported your efforts last year to extend the legislation which established the Office of Special Prosecutor, I support S.461 and believe that both the Governmental Affairs Committee and the full Senate should approve this bill readily.

It is imperative that the Office of Government Ethics be reauthorized. Fresh on everyone's mind these days are news reports regarding the U.S. Department of Environmental Protection. Illustrative of those items that warrant attention was the habit of one former agency official who was, as they say, "wined and dined" by the representatives of the very industries she was supposed to be monitoring. Such activities leave no doubt in my mind of the need for an Office of Government Ethics for (as the statute states) "promoting understanding of ethical standards in executive agencies."

As legislators we can never rest until adherence to high ethical standards by government officials becomes such a common practice that it is no longer a matter of urgent concern as it is now.

It is in this context that the Reagan Administration has engaged in what a recent Washington Post article described as "slippery behavior...in the highest reaches of government."

It is not surprising, either, that Common Cause's representative at the hearing has described the Reagan Administration's record in matters of government ethics as "far from stellar."

During the first two years of the current Administration, we have witnessed the following episodes, just to mention a few:

- Max Hugel, the one-time chief of the clandestine operations for the Central Intelligence Agency, who had to resign following reports of allegedly improper stock dealings;
- Former National Security Advisor Richard Allen, whose acceptance of cash gifts in the White House and other questionable business dealing caused the White House to seek his resignation;
- Nancy H. Steorts, the Chairman of the Consumer Product Safety Commission, who reportedly used her official limousine to drive her to lunch two blocks away from her office and to take her daughter to visit friends; and
- Robert Nimmo, the former VA Administrator, who resigned from his post before the General Accounting Office released a report which criticized him for misusing government facilities at his disposal.

Certainly, I am not going to suggest that merely "promoting understanding of ethical standards in executive agencies" by the Office of Government Ethics would have prevented these and other cases of questionable ethical behavior within the current Administration.

I am not heartened, however, by the fact that it has been six months since the Office of Government Ethics has had a director, nor am I encouraged by the fact that the number of staff at OGE remains below what it was when the Administration took office and that the Administration's proposed OGE funding for Fiscal Year 1984, as contained in the budget for the Office of Personnel Management (OPM) is -- in real terms -- at 1981 levels.

I am not encouraged, either, by the fact that OGE's Acting Director, David Scott, had to clear his testimony regarding S.461 with the White House (although it was heartening to hear Mr. Scott say for himself that he would prefer not to clear such testimony and explain how his personal opinions differed from his "cleared" testimony).

As Senator Levin has noted, it creates a bad appearance to clear the opinions from the Office of Government Ethics with the White House, an appearance that is "quite bad, when it's an office whose head is appointed by the President." I agree.

So, where should the subcommittee go from here? Here, I see some encouraging signs. I support the calls here today for making OGE's budget an independent line item. This, in itself, will protect the OGE from unwise and unwarranted budget cuts involving the Office of Personnel Management.

As Mr. Scott pointed out, "...when President Reagan directed a personnel freeze upon taking office in 1981, OGE was swept

into it because it was treated like any other OPM entity. Had OGE been considered a separate agency for hiring purposes, it could have escaped an unnecessary hardship, because the freeze directive itself exempted small agencies with less than 100 employees." ..."Because of OGE's small staff and budget a small ripple in OPM's budget and staffing plans becomes a tidal wave when it impacts on OGE. ..."

Second, I urge that the statute be amended so as to make the director a term appointment, removable only for cause. Such independence is necessary, I believe, in order to avoid giving the appearance that there may be a conflict or that ethical questions could exist, as in the case now when the director serves at the pleasure of the President.

Finally, I would urge a reauthorized and revitalized Office of Government Ethics to take it upon itself to pursue more aggressively its statutory mandate of "promoting understanding of ethical standards in executive agencies."

Ethical questions and conflicts may very well be avoided if there is a greater consciousness and awareness of ethical standards throughout the federal government.

But, first, it is up to this subcommittee, to the Governmental Affairs Committee, to the Senate and the Congress to reauthorize the Office of Government Ethics.

The passage of S.461 will renew our commitment to a strong order of government ethics, a commitment we first formalized five years ago. It is legislation that we must pass without delay.

Thank you.

WILLIAM V. ROTH, JR., DEL., CHAIRMAN
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United States Senate

COMMITTEE ON
GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT
WASHINGTON, D.C. 20510

October 13, 1982

David Scott, Esq.
Acting Director
Office of Government Ethics
1717 H Street, N.W.
Room 436
Washington, D.C. 20415

Dear Mr. Scott:

Early next year, the Senate Subcommittee on Oversight of Government Mangement will hold a hearing on the reauthorization of the Office of Government Ethics (OGE). To assist the Subcommittee in its preparation for the hearing, I request that you or the appropriate official(s) provide me with the following information.

(1) What is the operational relationship between the OGE and its parent agency, the Office of Personnel Management (OPM)?

(2) To which OPM official does the Director of the OGE report?

(3) What were the budget and staff levels of the OGE for fiscal years 1980, 1981 and 1982? What are the budget and staff levels for fiscal year 1983?

(a) What budget and staff levels did the Director of OGE request for each of these fiscal years?

(b) What budget and staff levels for your Office did the OPM recommend to the Office of Management and Budget (OMB)?

(c) Has your Office been able to operate effectively within these budget and staff levels?

(4) Please provide your recommendations concerning the future organizational structure of the OGE.

(a) Should the OGE continue to be part of the OPM with no substantial structural changes from the present law?

(b) Should the OGE continue to be part of the OPM, but present its budget request directly to the OMB and/or to the Congress?

(c) Should the OGE be reauthorized as an agency outside the OPM, yet have its operational needs provided by the General Services Administration?

(d) Should the OGE be reauthorized as a totally independent agency?

(e) Is there an alternative structure, not listed above, that the OGE would prefer?

In discussing the advantages and disadvantages of each alternative, please provide your views on how the option would affect the independence of the OGE in performing its statutory mandate and the day-to-day operation of your agency. Also, please indicate the budget and staff levels that you believe would be necessary for the OGE to operate effectively under each alternative.

(5) Should the Director of the Office of Government Ethics have a set term of office? What executive level position should the Director hold?

(6) Should the Congress give the OGE a permanent reauthorization, or should the reauthorization have a sunset date?

I would appreciate receiving your response by November 15. Please mail your response to the Subcommittee on Oversight of Government Management, Committee on Governmental Affairs, 3306 Dirksen Senate Office Building, Washington, D.C. 20510, or have it delivered to the Subcommittee's office at 506 Carroll Arms, 301 First Street, N.E.

Your assistance is greatly appreciated. If you have any questions, please contact Mary Berry Gerwin or Susan Collins of the Subcommittee staff at 224-5538.

With best wishes, I am

Sincerely,

William S. Cohen
Chairman

WSC:mbg

United States of America
Office of Government Ethics

Office of Personnel Management
Washington, D.C. 20415

DEC 10 1982

Honorable William S. Cohen
Chairman
Subcommittee on Oversight
of Government Management
Committee on Governmental Affairs
3306 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

We appreciate very much your staff granting us an extension to answer the questions you have asked of this Office in your letter of October 13, 1982. We are eager to assist your Subcommittee on Oversight of Government Management in its preparation for a hearing in 1983 on the reauthorization of the Office of Government Ethics ("OGE"). The responses to your questions will be presented seriatim and are necessarily abbreviated. Needless-to-say, if you wish us to expand on any of these answers, we would be more than happy to do so in whatever way you deem most beneficial.

(1) What is the operational relationship between the OGE and its parent agency, the Office of Personnel Management (OPM)?

Title IV of the Ethics in Government Act of 1978, as amended, (the Act) established OGE as a statutory agency in OPM, § 401(a); 5 U.S.C app. § 401(a). Section 402(a) specifies that OGE "shall provide, under the general supervision of the Office of Personnel Management, overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees" of executive branch agencies.

In general, this broad directive of section 402(a) of the Act has been carried out by OGE acting independently of OPM in its dealings with other federal agencies on issues involving substantive conflicts of interest (18 U.S.C. §§ 202-209) and standards of conduct (E.O. 11222 and 5 C.F.R. Part 735). On the other hand, OPM has at all times exercised administrative control over the budgetary, personnel and logistical operations of OGE. For example, under the Act, OGE has the responsibility of drafting regulations to implement the Act's directives but must obtain OPM's approval of these regulations before issuing them in OPM's name. See § 402(b)(1),(2)(12) and (15) and § 405. In practice, OPM's part in the whole process has been nominal and it has accepted virtually all of the substantive

recommendations that OGE has made on these regulations. Similarly, OGE has fulfilled its substantive statutory responsibilities to oversee the public financial reporting program imposed by Title II of the Act and to render advisory opinions on various conflict of interest and ethical issues entirely independently of OPM (as the Ethics Act requires).

The Director of OPM, Donald J. Devine, best explained this operational relationship when he submitted written testimony to an Oversight Hearing of the Subcommittee on Civil Service of the Committee on Post Office and Civil Service of the House of Representatives on September 22, 1981. In responding to a question from that Committee on why he had in 1981 changed the organizational reporting of the Director of OGE from him to the Deputy Director of OPM, Director Devine summarized succinctly the overall operational relationship of OGE to OPM:

> 9. Your new [OPM] organizational chart has the Director of the Office of Government Ethics reporting to the Deputy Director [of OPM], not the Director. Why have you [Director Devine of OPM] downgraded this office?

[Director Devine's response]

> Simply stated, I have not downgraded the Office of Government Ethics (OGE). In implementing my management philosophy, I reduced the number of OPM organizations reporting directly to me. OGE was established as a special unit within OPM by the Ethics in Government Act of 1978. That Office and its program, due to its effective leadership, runs with substantial independence and is very successful. Presently, the major point of interaction between the Director, OGE (a Presidential Appointee, subject to the advice and consent of the Senate), and my immediate office is in the area of assuring OGE prompt and adequate support from OPM's administrative offices (e.g., Personnel, Budget, Management) which, under the new organizational alignment, also report to the Deputy Director. (Excerpted from the Hearing before the Subcomm. on Civil Service of the House Comm. on Post Office and Civil Service, 97th Cong. 1st Sess. 52-53, (1981).)

As Director Devine pointed out, OGE has an "advice and consent" presidential appointee to carry out its statutorily defined programs and responsibilities, which are strikingly different from OPM's. Consequently, OPM has seen its major role vis-a-vis OGE to be that of providing it with "adequate support from OPM's administrative offices (e.g., Personnel, Budget, Management)." OGE in fact is the only entity within OPM which has been statutorily created and therefore has distinct, Congressionally mandated goals and duties which are not part of OPM's mandates under the Civil Service Reform Act of 1978. See our response infra to your question No. 4 for a further discussion of this topic.

(2) To which OPM official does the Director of the OGE report?

Until mid 1981 the Director of OGE reported directly to the Director of OPM. Since then, as part of an organizational change within OPM, the Director of OGE reports to the Deputy Director of OPM. See the discussion in (1) above.

(3) What were the budget and staff levels of the OGE for fiscal years 1980, 1981 and 1982? What are the budget and staff levels for fiscal year 1983?

	BUDGET LEVEL	STAFF LEVEL
FY 1980[1]	637.4[3]	16
FY 1981[2]	938.5	26
FY 1982	951.3	23.4
FY 1983	1016	23.5

The figures for FY 1980-82 represent actual year ending levels; those for FY 83 are perforce tentative.

(a) What budget and staff levels did the Director of OGE request for each of these fiscal years?

FY 1980[1]	1000	25
FY 1981[2]	1000	25
FY 1982	1048	27
FY 1983	1200	26.5

(b) What budget and staff levels for your Office did the OPM recommend to the Office of Management and Budget (OMB)?

FY 1980[1]	850	20
FY 1981[2]	891	20
FY 1982	1048	27
FY 1983	1009	24.3

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[1]The discrepancy in actual budget and staff levels in FY 80 from the figures requested by OGE and recommended by OPM for that fiscal year occurred by reason of the fact that OGE was not able to recruit its full staff in its first fiscal year (1980).

[2]The actual staff level for FY 1981 was higher than that recommended by OPM for that fiscal year since OPM at OGE's request subsequently authorized OGE to hire new employees in 1981 at the level projected for FY 1982 in view of OGE's unique and enhanced responsibilities for administering the Act during the transition of Presidential Administrations.

[3]The budget level figures are expressed in the thousands.

(c) Has your Office been able to operate effectively within these budget and staff levels?

Yes. The budget and staff level figures outlined above indicate that in large measure OGE actually received the budget and staffing levels it requested for FY 1980 through FY 1983. For example, OGE is making whatever adjustments are necessary to curtail some of its activities to come within its less than requested 1983 FY budget (approximately $200,000 less) and staff level (3 FTE's less). That is, of course, a government-wide problem, which in no way makes OGE unique. It should be pointed out, however, that OGE received largely what it wanted because of special negotiations and agreements. Cooperation from individual leaders in OPM after a direct appeal from OGE played far too large a role in ensuring these adequate budget and staffing levels for OGE. What has become apparent in OGE's four years of existence is that OGE needs to have its own budgetary and staffing authority and not to have to be dependent on OPM's largesse. Simply stated, OGE has no way of controlling that in the next four fiscal years (FY 84-87) OGE will receive the same cooperation from OPM that it did in the first four years (FY 80-83). The successors to Director Devine and Deputy Director Loretta Cornelius may not support OGE's statutory mission and importance in the same way that they did. If so, OGE would be unable to combat any resultant cut-back in funding and personnel. Consequently as discussed below in (4), we believe that OGE should be given the power to submit its proposed budget directly to OMB and that ultimately Congress should set the final figure as a line item. (At present Congress has merely authorized up to 2 million dollars a year for OGE's needs but OGE has no line appropriations from Congress. See § 405 of the Act.)

(4) Recommendations concerning the future organizational structure of the OGE.

(a) Should the OGE continue to be part of the OPM with no substantial structural changes from the present law?

As discussed in answers (1) and (3)(c) above, OGE would benefit from some structural modifications. To insure its independence and viability, OGE should have its own authority to present its own budget and staff levels directly to OMB (see 4(b) infra), to have its own hiring authority (apart from OPM) and to meet its actual budget figures once appropriated by Congress in whatever way OGE deems best. If these changes were made, OGE could well continue to receive services from OPM.

As stated before, OGE is a small statutory agency, the only one within OPM. Unless these "structural changes" are made, OGE will always be exposed to the possibility of being "swallowed up" or ignored by OPM due to OPM's much larger size (approximately 5,000 persons in OPM to approximately 25 in OGE) and different statutory mission. OPM's primary concern is and must remain the promotion of an efficient and effective civil service personnel system. The running of the senior executive service system, the application of merit system principles, the management of the executive

branch health care and retirement systems are central to its responsibilities. OGE deals with the prevention of criminal conflict of interest violations and standards of conduct compliance — areas of concern that are of a different nature from OPM's primary activities. When President Reagan directed a personnel freeze upon taking office in 1981, OGE was swept up into it because it was treated like any other OPM entity. Had OGE been considered a separate agency for hiring purposes it would have escaped an unnecessary hardship because the freeze directive itself exempted agencies with less than 100 employees. Similarly when OPM reduced its budget in 1982 by means of reductions-in-force ("RIFs"), OGE first had to argue to OPM that "riffing" its tiny staff would be disastrous to its mission and was budgetarily unnecessary. Having been successful in that argument, OGE still had to absorb the resultant "bumps" from other personnel in OPM who were "riffed" and thereby OGE suffered dislocating personnel losses anyway. If OGE had possessed its own authority to decide how to handle the mandated budget cuts, that would not have occurred.

(b) Should the OGE continue to be part of the OPM, but present its budget request directly to the OMB and/or to the Congress?

From the foregoing analysis, this is the most viable solution if OGE were also given authority to hire personnel, lease space and issue regulations in its own name. To recapitulate the discussion above, OGE with its small staff (approximately 25 persons) and small budget (approximately one million dollars) does not have the necessary clout with OPM to ensure that its (OGE's) unique statutory mission and duties are fulfilled. Therefore, OGE seeks to institutionalize its independence within OPM by having its own budgetary, personnel hiring and regulation issuing authority. This could be achieved by a few relatively simple legislative changes and the working out with OPM of an arrangement whereby OGE's operational needs would be provided through a liaison official within OPM similar to the services performed by officials in the Agency Liaison Division of General Services Administration ("GSA"). We could reimburse OPM for these services under the authority of 31 U.S.C. 686 which states, in part, that any executive department or independent establishment or any bureau or office thereof may place orders with any such department, establishment, bureau or office. In this fashion we could remain under the "umbrella" of OPM but have our own independent status. We would pay OPM out of our own budget for the services it would perform for us rather than having OPM determine our budget, as it does at the present time. (OGE would, of course, have to have more money in its own budget to receive the necessary services from OPM because some items such as space rental would become a direct expense for OGE.)[4]

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[4]At the present time OPM assigns space to OGE without a direct charge. OPM authorizes OGE money for personnel, travel, and furniture. Other expenses such as space, postage, and telephone are absorbed by OPM. For example, if OGE were to pay for its own space, it would cost us approximately $80,000 per year for our present and planned for space.

In point is the legislation setting up the United States Arms Control and Disarmament Agency (ACDA). ACDA is authorized to employ its own personnel, adopt its own rules and regulations and seek its own appropriations (22 U.S.C. § 2581 and 2589). It is the expressed intent of ACDA's enabling Act that "the Director rely upon the Department of State for general administrative services," but ACDA can utilize the services of "any other government agency." ACDA has elected to use the Agency Liaison Division within GSA for many of its operational needs. This OGE could do if we could not make satisfactory arrangements with OPM.

(c) Should the OGE be reauthorized as an agency outside the OPM, yet have its operational needs provided by the General Services Administration?

If the changes suggested in 4(a) are effected, this would not be necessary. OGE should remain a part of OPM as long as its administrative support from OPM is institutionalized. If this should not be feasible, OGE would look for support from the Agency Liaison Division within GSA that handles such services for some 30 other agencies.

(d) Should the OGE be reauthorized as a totally independent agency?

No, because OGE recognizes the understandable reluctance of Congress to create additional independent agencies. The entire thrust of the legislative and executive branches in this era is to centralize, streamline, and economize on executive agencies. To create a new tiny independent agency of OGE would run counter to this trend.

(e) Is there an alternative structure, not listed above, that the OGE would prefer?

In light of the foregoing answers, no.

(5) Should the Director of the Office of Government Ethics have a set term of office? What executive level should the Director hold?

Yes, from an ideal viewpoint. OGE could be strengthened in its independence if its Director were appointed for a fixed period of years, such as five years, to overlap the term of any President and to be removable only for cause rather than at the pleasure of the President. OGE, in effect, would become institutionalized as a non-political office analogous to an independent board or commission. See Humphrey's Executor v. United States, 295 U.S. 602 (1935)., Wiener v. United States, 357 U.S. 349 (1958).

The Director of OGE can be, at times, in an anomalous position. The Act requires the Director to review the financial reports of executive appointees and to report his opinion of their conflicts, if any, to the Senate Committee considering the nomination. The Director must be responsive to both the President and the Senate and yet keep his independence from both. To be effective, the Director must make difficult, delicate decisions in an apolitical manner. He should have the confidence of the President but also should feel free to act apart from the President's wishes. A fixed term of office would further these goals.

The Director should have a position at level III or IV of the Executive Schedule. The Director now has a level V Executive position, the annual pay for which is incongrously $1,000 lower than that of his Deputy Director, who is in the Senior Executive Service.

(6) Should the Congress give the OGE a permanent reauthorization, or should the authorization have a sunset date?

OGE should have a permanent reauthorization without a sunset date. OGE has been in existence for four years and by this time its status as an integral part of the Federal Government, we believe, has been established.

Thank you again for the opportunity you have given us to respond to your inquiries. Please let us know if you need any additional information.

Sincerely,

David R. Scott

David R. Scott
Acting Director

Executive Order 11222

PRESCRIBING STANDARDS OF ETHICAL CONDUCT FOR GOVERNMENT OFFICERS AND EMPLOYEES

By virtue of the authority vested in me by Section 301 of Title 3 of the United States Code, and as President of the United States, it is hereby ordered as follows:

PART I—POLICY

SECTION 101. Where government is based on the consent of the governed, every citizen is entitled to have complete confidence in the integrity of his government. Each individual officer, employee, or adviser of government must help to earn and must honor that trust by his own integrity and conduct in all official actions.

PART II—STANDARDS OF CONDUCT

SECTION 201. (a) Except in accordance with regulations issued pursuant to subsection (b) of this section, no employee shall solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from any person, corporation, or group which—

(1) has, or is seeking to obtain, contractual or other business or financial relationships with his agency;

(2) conducts operations or activities which are regulated by his agency; or

(3) has interests which may be substantially affected by the performance or nonperformance of his official duty.

(b) Agency heads are authorized to issue regulations, coordinated and approved by the Civil Service Commission, implementing the provisions of subsection (a) of this section and to provide for such exceptions therein as may be necessary and appropriate in view of the nature of their agency's work and the duties and responsibilities of their employees. For example, it may be appropriate to provide exceptions (1) governing obvious family or personal relationships where the circumstances make it clear that it is those relationships rather than the business of the persons concerned which are the motivating factors—the clearest illustration being the parents, children or spouses of federal employees; (2) permitting acceptance of food and refreshments available in the ordinary course of a luncheon or dinner or other meeting or on inspection tours where an employee may properly be in attendance; or (3) permitting acceptance of loans from banks or other financial institutions on customary terms to finance proper and usual activities of employees, such as home mortgage loans. This section shall be effective upon issuance of such regulations.

(c) It is the intent of this section that employees avoid any action, whether or not specifically prohibited by subsection (a), which might result in, or create the appearance of—

(1) using public office for private gain;

(2) giving preferential treatment to any organization or person;

(3) impeding government efficiency or economy;

(4) losing complete independence or impartiality of action;

(5) making a government decision outside official channels; or

(6) affecting adversely the confidence of the public in the integrity of the Government.

SEC. 202. An employee shall not engage in any outside employment, including teaching, lecturing, or writing, which might result in a conflict, or an apparent conflict, between the private interests of the employee and his official government duties and responsibilities, although such teaching, lecturing, and writing by employees are generally to be encouraged so long as the laws, the provisions of this order, and Civil Service Commission and agency regulations covering conflict of interest and outside employment are observed.

SEC. 203. Employees may not (a) have direct or indirect financial interests that conflict substantially, or appear to conflict substantially, with their responsibilities and duties as Federal employees, or (b) engage in, directly or indirectly, financial transactions as a result of, or primarily relying upon, information obtained through their employment. Aside from these restrictions, employees are free to engage in lawful financial transactions to the same extent as private citizens. Agencies may, however, further restrict such transactions in the light of the special circumstances of their individual missions.

SEC. 204. An employee shall not use Federal property of any kind for other than officially approved activities. He must protect and conserve all Federal property, including equipment and supplies, entrusted or issued to him.

SEC. 205. An employee shall not directly or indirectly make use of, or permit others to make use of, for the purpose of furthering a private interest, official information not made available to the general public.

SEC. 206. An employee is expected to meet all just financial obligations, especially those--such as Federal, State, or local taxes--which are imposed by law.

PART III--STANDARDS OF ETHICAL CONDUCT FOR SPECIAL GOVERNMENT EMPLOYEES

SECTION 301. This part applies to all "special Government employees" as defined in Section 202 of Title 18 of the United States Code, who are employed in the Executive Branch.

SEC. 302. A consultant, adviser or other special Government employee must refrain from any use of his public office which is motivated by, or gives the appearance of being motivated by, the desire for private gain for himself or other persons, including particularly those with whom he has family, business, or financial ties.

SEC. 303. A consultant, adviser, or other special Government employee shall not use any inside information obtained as a result of his government service for private personal gain, either by direct action on his part or by counsel, recommendations or suggestions to others, including particularly those with whom he has family, business, or financial ties.

SEC. 304. An adviser, consultant, or other special Government employee shall not use his position in any way to coerce, or give the appearance of coercing, another person to provide any financial benefit to him or persons with whom he has family, business, or financial ties.

SEC. 305. An adviser, consultant, or other special Government employee shall not receive or solicit from persons having business with his agency anything of value as a gift, gratuity, loan or favor for himself or persons with whom he has family, business, or financial ties while employed by the government or in connection with his work with the government.

SEC. 306. Each agency shall, at the time of employment of a consultant, adviser, or other special Government employee require him to supply it with a statement of all other employment. The statement shall list the names of all the corporations, companies, firms, State or local governmental organizations, research organizations and educational or other institutions in which he is serving as employee, officer, member, owner, director, trustee, adviser, or consultant. In addition, it shall list such other financial information as the appointing department or agency shall decide is relevant in the light of the duties the appointee is to perform. The appointee may, but need not, be required to reveal precise amounts of investments. The statement shall be kept current throughout the period during which the employee is on the Government rolls.

PART IV—REPORTING OF FINANCIAL INTERESTS

SECTION 401. (a) Not later than ninety days after the date of this order, the head of each agency, each Presidential appointee in the Executive Office of the President who is not subordinate to the head of an agency in that Office, and each full-time member of a committee, board, or commission appointed by the President, shall submit to the Chairman of the Civil Service Commission a statement containing the following:

(1) A list of the names of all corporations, companies, firms, or other business enterprises, partnerships, nonprofit organizations, and educational or other institutions--

(A) with which he is connected as an employee, officer, owner, director, trustee, partner, adviser, or consultant; or

(B) in which he has any continuing financial interests, through a pension or retirement plan, shared income, or otherwise, as a result of any current or prior employment or business or professional association; or

(C) in which he has any financial interest through the ownership of stocks, bonds, or other securities.

(2) A list of the names of his creditors, other than those to whom he may be indebted by reason of a mortgage on property which he occupies as a personal residence or to whom he may be indebted for current and ordinary household and living expenses.

(3) A list of his interests in real property or rights in lands, other than property which he occupies as a personal residence.

(b) Each person who enters upon duty after the date of this order in an office or position as to which a statement is required by this section shall submit such statement not later than thirty days after the date of his entrance on duty.

(c) Each statement required by this section shall be kept up to date by submission of amended statements of any changes in, or additions to, the information required to be included in the original statement, on a quarterly basis.

SEC. 402. The Civil Service Commission shall prescribe regulations, not inconsistent with this part, to require the submission of statements of financial interests by such employees, subordinate to the heads of agencies, as the Commission may designate. The Commission shall prescribe the form and content of such statements and the time or times and places for such submission.

SEC. 403. (a) The interest of a spouse, minor child, or other member of his immediate household shall be considered to be an interest of a person required to submit a statement by or pursuant to this part.

(b) In the event any information required to be included in a statement required by or pursuant to this part is not known to the person required to submit such statement but is known to other persons, the person concerned shall request such other persons to submit the required information on his behalf.

(c) This part shall not be construed to require the submission of any information relating to any person's connection with, or interest in, any professional society or any charitable, religious, social, fraternal, educational, recreational, public service, civic, or political organization or any similar organization not conducted as a business enterprise and which is not engaged in the ownership or conduct of a business enterprise.

SEC. 404. The Chairman of the Civil Service Commission shall report to the President any information contained in statements required by Section 401 of this part which may indicate a conflict between the financial interests of the official concerned and the performance of his services for the Government. The Commission shall report, or by regulation require reporting, to the head of the agency concerned any information contained in statements submitted pursuant to regulations issued under Section 402 of this part which may indicate a conflict between the financial interests of the officer or employee concerned and the performance of his services for the Government.

SEC. 405. The statements and amended statements required by or pursuant to this part shall be held in confidence, and no information as to the contents thereof shall be disclosed except as the Chairman of the Civil Service Commission or the head of the agency concerned may determine for good cause shown.

SEC. 406. The statements and amended statements required by or pursuant to this part shall be in addition to, and not in substitution for, or in derogation of, any similar requirement imposed by law, regulation, or order. The submission of a statement or amended statements required by or pursuant to this part shall not be deemed

to permit any person to participate in any matter in which his participation is prohibited by law, regulation, or order.

PART V—DELEGATING AUTHORITY OF THE PRESIDENT UNDER SECTIONS 205 AND 208 OF TITLE 18 OF THE UNITED STATES CODE RELATING TO CONFLICTS OF INTEREST

SECTION 501. As used in this part, "department" means an executive department, "agency" means an independent agency or establishment or a Government corporation, and "head of an agency" means, in the case of an agency headed by more than one person, the chairman or comparable member of such agency.

SEC. 502. There is delegated, in accordance with and to the extent prescribed in Sections 503 and 504 of this part, the authority of the President under Sections 205 and 208(b) of Title 18, United States Code, to permit certain actions by an officer or employee of the Government, including a special Government employee, for appointment to whose position the President is responsible.

SEC. 503. Insofar as the authority of the President referred to in Section 502 extends to any appointee of the President subordinate to or subject to the chairmanship of the head of a department or agency, it is delegated to such department or agency head.

SEC. 504. Insofar as the authority of the President referred to in Section 502 extends to an appointee of the President who is within or attached to a department or agency for purposes of administration, it is delegated to the head of such department or agency.

SEC. 505. Notwithstanding any provision of the preceding sections of this part to the contrary, this part does not include a delegation of the authority of the President referred to in Section 502 insofar as it extends to:

(a) The head of any department or agency in the Executive Branch;

(b) Presidential appointees in the Executive Office of the President who are not subordinate to the head of an agency in that Office; and

(c) Presidential appointees to committees, boards, commissions, or similar groups established by the President.

PART VI—PROVIDING FOR THE PERFORMANCE BY THE CIVIL SERVICE COMMISSION OF CERTAIN AUTHORITY VESTED IN THE PRESIDENT BY SECTION 1753 OF THE REVISED STATUTES

SECTION 601. The Civil Service Commission is designated and empowered to perform, without the approval, ratification, or other action of the President, so much of the authority vested in the President by Section 1753 of the Revised Statutes of the United States (5 U.S.C. 631) as relates to establishing regulations for the conduct of persons in the civil service.

SEC. 602. Regulations issued under the authority of Section 601 shall be consistent with the standards of ethical conduct provided elsewhere in this order.

PART VII—GENERAL PROVISIONS

SECTION 701. The Civil Service Commission is authorized and directed, in addition to responsibilities assigned elsewhere in this order:

(a) To issue appropriate regulations and instructions implementing Parts II, III, and IV of this order;

(b) To review agency regulations from time to time for conformance with this order; and

(c) To recommend to the President from time to time such revisions in this order as may appear necessary to ensure the maintenance of high ethical standards within the Executive Branch.

SEC. 702. Each agency head is hereby directed to supplement the standards provided by law, by this order, and by regulations of the Civil Service Commission with regulations of special applicability to the particular functions and activities of his agency. Each agency head is also directed to assure (1) the widest possible distribution of regulations issued pursuant to this section, and (2) the availability of counseling for those employees who request advice or interpretation.

SEC. 703. The following are hereby revoked:

(a) Executive Order No. 10939 of May 5, 1961.

(b) Executive Order No. 11125 of October 29, 1963.

(c) Section 2(a) of Executive Order No. 10530 of May 10, 1954.

(d) White House memorandum of July 20, 1961, on "Standards of Conduct for Civilian Employees."

(e) The President's Memorandum of May 2, 1963, "Preventing Conflicts of Interest on the Part of Special Government Employees." The effective date of this revocation shall be the date of issuance by the Civil Service Commission of regulations under Section 701(a) of this order.

SEC. 704. All actions heretofore taken by the President or by his delegates in respect of the matters affected by this order and in force at the time of the issuance of this order, including any regulations prescribed or approved by the President or by his delegates in respect of such matters, shall, except as they may be inconsistent with the provisions of this order or terminate by operation of law, remain in effect until amended, modified, or revoked pursuant to the authority conferred by this order.

SEC. 705. As used in this order, and except as otherwise specifically provided herein, the term "agency" means any executive department, or any independent agency or any Government corporation; and the term "employee" means any officer or employee of an agency.

LYNDON B. JOHNSON

THE WHITE HOUSE,
May 8, 1965.

MAY 14 1982

AMENDMENTS PROPOSED BY THE OFFICE OF GOVERNMENT ETHICS TO THE ETHICS IN GOVERNMENT ACT.

by

David R. Scott, Chief Counsel

This paper will discuss certain proposed amendments to the Ethics in Government Act of 1978, Pub. L. 95-521, as amended, 5 USC app. 101 et seq, ("the Act"). The following suggestions to amend the Act are made solely by the Office of Government Ethics ["OGE"] which has the responsibility for administering the Act's provisions as they relate to the executive branch. See Title IV of the Act, 5 USC app. 401 et seq. Within one year of the Act's passage on October 26, 1978, two amendments affecting titles I, II, III and V were passed by Congress to take care of certain "technical" problems in the Act. (Pub. L. 96-19 was passed on June 13, 1979 and Pub. L. 96-28 was passed on June 22, 1979.) Since those amendments, there has been no lack of ideas to alter the Act again. These suggestions range from very broad philosophical ones such as the discontinuance of all public financial disclosure as an unwarranted invasion of privacy to very narrow ones such as the need to clarify what is a "gift" as opposed to a "reimbursement".

Rather than trying to do the impossible, ie. discuss all the proposed amendments about which OGE has been informed from both government and private sources, this paper will only focus on those aspects of the Act which OGE believes most need fixing based on the first three years of experience in dealing with issues raised by the Act. These OGE proposals do not deal with the philosophical level debate over the Act (one example is given above) nor do they address the very narrow (albeit important) issues of semantics (e.g., need-to-clarify certain definitions). Instead the OGE proposals concern a level which might be characterized as "technical", not "philosophical", yet is broader than mere word clarifications. In short, rather than trying to be exhaustive on this subject, OGE will briefly summarize the seven areas in the Act which OGE believes most urgently need attention.

One disclaimer on the subject matter of this paper should be emphasized. It has come to OGE's attention that anytime the subject of "amending the Ethics in Government Act" has come up in speeches, at conferences, or in newspaper/magazine articles, there is great confusion about what that phrase actually means. It surprises many to learn that "amending the Ethics in Government Act" would have no effect on the underlying criminal conflict of interest statutes (18 USC §§ 202-209) except for the so-called "revolving door" rules for former government employees (found in Title V of the Act and in 18 USC § 207 as amended.) It surprises even more people to learn that "amending the Ethics in Government Act" would not affect the issue of the necessity of divestiture of one's assets at all. There simply is no requirement anywhere in the Act to dispose of anything. Rather forced divestiture or even voluntary divestiture are issues raised by the organic statutes of some agencies (see, e.g., the Department of Energy's organic act 42 USC § 7212 (a) which prohibits supervisory employees of the department from owning "pecuniary interests" in any "energy concerns"), 18 USC § 208(a) (the criminal statute prohibition against taking actions as a government employee which affect one's personal financial interests), and some Senate confirmation committees (e.g., the Senate Armed Services Committee). In truth the concept of "amending the Ethics in Government Act" has become a rallying cry and focal point for those who find fault with any of the myriad

conflict of interest principles. In fact those persons must be reminded that the reality of the situation is that "amending the Ethics in Government Act" in any way may not even touch on their real grievances.

The following are the seven areas in the Act which OGE believes most need fixing:

1. Eliminate public financial disclosure by the career civil service. At the present time, the categories of government employees who are required to file public financial reports are too numerous and unrelated to the Act's underlying purposes. The Act requires in Section 201(f)(3) that all government employees classified at GS-16 or above of the General Schedule and all military officers "...whose pay grade is at or in excess of 0-7..." must file public financial disclosure reports.* This amounts to approximately 11,000 annual public filings in the various agencies. These are reviewed by the agency ethics officials and made available within 15 days of receipt for public inspection. See Section 205 (b)(1) of the Act.

OGE believes these categories are over-inclusive and yet not fine-tuned enough to include certain persons below GS-16's who should file publicly. An obvious example of this would be the GS-12 procurement officer who influences the letting of millions of dollars of government contracts per month. At present, that person would not have to file a public financial report while a GS-16 personnel officer who never deals with the public would. OGE advocates that the long term solution to this problem is to have the Congress and/or the GAO narrow and redefine the conflict of interest sensitive positions in the executive branch. If that could be achieved, it would produce the twin benefit of less invasion of privacy for government employees who are not subject to conflict of interest temptations and more scrutiny of that group of employees who are. However, to date neither Congress nor the GAO has been willing to undertake the time-consuming and difficult task of attempting such redefintions of who should publicly file.

With this background, OGE's alternative suggestion in this area is to narrow the group that must file publicly to essentially political appointees while still requiring confidential filings from the GS-16's, 0-7's— and above in the career civil and career military service.** In this context, political appointees are defined as those who are appointed by the President and who require Senate confirmation to hold their jobs, non-career members of the Senior Executive Service and other comparable non-career executive positions in the Executive Office of the President. See Pub. L. 95-570 (Nov. 2, 1978). The most important group of these political appointees is the one which requires the advice and consent of the Senate. Historically, they have always had to file financial statements with the Senate which in turn has made them available to the public under their (the Senate) rules. As the top policymakers of their agencies, they have always been

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*There are, of course, other categories of persons who must file public reports such as Schedule C personnel with positions of confidential or policymaking character and all designated agency ethics officials. But the GS-16's and above and the 0-7's and above are by far the two largest groups.

**For the sake of economy of discussion, the career military service will be considered to be synonymous with the career civil service for purposes of this issue only.

of great interest to the public (especially the press) in regard to what private interests might influence their public policymaking. In addition, the political appointees average only 20 months* in office and therefore are the group most in the position to take advantage of their jobs for present or even future private employment gain. The experience of OGE has bord out that a disproportionate number of conflict issues exist with these appointees. Continuing to make them file public reports under the Act is nothing more than statutorily condoning a pre-existent, required and sensible practice by the individual Senate Committees.

Conversely, none of these arguments apply with the same force to the career civil service. OGE has found that the public does not inquire about what they hold** and seemingly does not care. Historically, of course, the career civil service has never been required to reveal their assets publicly. The pervasive issue of when the government employee's right to privacy must be tempered by the public's right to know is finally decided in OGE's opinion on the wealth of evidence that the career civil service presents relatively few conflict of interest problems when compared to the political appointees who use the "revolving door" so much more often. Thus, requiring the careerists to file confidential, not public, statements would not hurt any important "sunshine" right of the public and would still ensure that the conflict problems that the career civil service do generate are reviewed.

2. Provide for the special problems of Presidential Transition periods. Stated in the most stark way, the Act provides absolutely no guidance as to the special problems encountered in that interim period between a general election and the assumption of power of a new President—the so-called Presidential Transition period. Two examples of problems that have been encountered because of this deficiency will suffice: (1) The Act presupposes a President to send nominations to the Senate to trigger the applicable agency's and OGE's reviews of public disclosure reports for conflict of interest purposes. In a Presidential Transition period (from roughly the first week of November until the following January 20th), the President-Elect, of course, has no power to make nominations and hence, literally speaking, neither the agencies nor OGE are entitled to review or even be informed of his proposed candidates who will need Senate confirmation after he takes power. If that practice had been followed with the Reagan Administration, the bottleneck created by the Ethics in Government Act in preventing the Cabinet from being speedily confirmed would have been colossal. Instead, OGE invented a solution with the help of the Reagan Transition Team whereby the President-Elect's notice of "intent to nominate" in advance of January 20, 1981 was treated as tantamount to a nomination. The applicable agency and OGE then proceeded to review and to resolve "intended" candidates' conflict problems well before January 20th so that the Senate was able to have OGE's opinion letter on that subject in hand well before the candidates could be confirmed. While the bottleneck was thereby averted, OGE suggests that the Act be

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*See article by E. Pendleton James, Assistant to the President for Presidential Personnel, in Business Week: April 19, 1982 at p. 19.

**Written records, of course, must be kept under the Act of who requests to see what public financial report. See Section 205 of the Act. OGE has kept particular track of the numerical difference in requests for the financial statements of political appointees (many) as opposed to the career civil service (virtually none.).

amended to formalize this ad hoc solution. (2) Public release of disclosure reports is predicated on their "receipt" by the applicable agency and by OGE. Section 205 (b)(1) of the Act. In a Presidential Transition period, if the agency receives an "intended" candidate's signed disclosure report from the President-Elect, must the agency make that report publicly available within the normal 15 days even though no actual nomination has been made? OGE ruled that it should because the agency was being given the disclosure report in order to exercise its official review role, see 5 C.F.R. § 734.604 (c), and because the disclosure report was being treated as if there had been a nomination. (A contrary OGE ruling would have made the agency ethics officials quasi-security agents guarding the secrets of the candidates' "public" financial disclosure reports from the public—an inherently contradictory and difficult position). Again OGE believes that the Act should be amended to resolve this issue explicitly.

These two types of issues associated with the Presidential Transition period should at the minimum be addressed by the Act. If they are not, needless disagreements with a future Presidential Transition Team and a slowed-down transition process may result.

3. Section 210 of the Ethics in Government Act should be abolished. As presently written, Section 210 of the Act, 5 U.S.C. app § 210, prohibits Senate confirmed presidential appointees (GS-16 or above) who work full-time in the executive branch from earning in "outside earned income" more than 15% of their government salary. See the implementing regulations which define what constitutes "outside earned income" 5 C.F.R. § 734.501(b). The dual underlying purposes of this section are commendable—to prevent executive branch officials from cashing in on their positions of influence or being affected by the prospects of outside income and to insure that outside activities do not detract unduly from an official's attention to his job. See 124 Cong. Rec 32003-08 (1978). The difficulties with interpreting this provision are, however, legion and even if OGE determines that an individual has violated it, there are no stated sanctions which attach. What then is OGE to make of a provision which leaves completely open the question of what Congress wanted done with transgressors? What indeed when Congress itself has had second thoughts about similar outside earned income limitations in the case of its own members. See, e.g., H. J. Res. 325, Pub. L. 97-51, Oct. 1, 1981, 2 U.S.C. 44li, as amended, which abandoned the $25,000 yearly aggregate limitation for honorariums given to Senators, Congressmen and executive branch officials. How should OGE deal with the problem of book royalties paid to a government employee who is promoting a book during his government tenure (outside of work hours) which he wrote before he became a government employee? The Act simply gives no guidance.

OGE believes that the answer to these questions is to have Congress abolish Section 210 as unworkable. Since the standards of conduct in Executive Order 11222 already require that an executive branch employee not permit his outside activities to undermine his government work, see, e.g., Section 201 (c) (1) and (c) (3) of E. O. 11222, the main thrust of Section 210 is already covered by other provisions. In addition, an artificial limitation of 15% on "outside earned income" is not only difficult to define and to enforce as described above but also is a hindrance to presidential recruiting in these trying economic times when salaries of those now affected by Section 210 are routinely capped.

4. Clarify and simplify the blind trust rules. As presently written, the Act nowhere requires anyone to have a blind trust. Rather the blind trust provisions in the Act are provided as available tools to help government officials avoid potential conflicts of interest. The theory, of course, is that if a government official does not know what he owns due to his assets being in "blind" trust, then he cannot take official actions to benefit his personal financial interests. OGE endorses the concept of blind trusts as one

of the useful alternatives to remedy conflict of interest problems but recommends that certain recurring problems in establishing and administering them be rectified. Three of the most common problems follow:

(a) The availability of "instant blindness" qualified diversified blind trusts should be expanded to include all executive branch employees. The Act presently limits the availability of one of the two kinds of condoned blind trusts to Senate confirmed presidential appointees in the executive branch. See Section 202 (f)(4)(B) of the Act. The qualified diversified blind trust described therein gives broader protection from conflict problems than the qualified blind trust (Section 202(f)(3)—which is available to all executive branch officials) because the assets placed into the qualified diversified trust are deemed to be immediately "unknown" to the grantor-government official. The Section 202(f)(3) blind trust, on the other hand, only provides for "gradual blindness" because the original assets placed in the trust are not deemed to be "unknown" until disposed of or reduced to a value under $1,000. While there are more stringent eligibility requirements for the qualified diversified trusts than for the qualified blind trusts, OGE believes it is inequitable to have only a limited number of senior executive branch officials eligible for this broad form of relief. Why should an Assistant Secretary of the Department of State, a Senate confirmed position, be able to use this qualified diversified trust cure when the National Security Adviser and White House Counsel to the President, both non-Senate confirmed positions, are not? OGE recommends that the eligible category be therefore expanded to coincide with the qualified blind trusts (that is, the entire executive branch). A less desireable alternative would be to abolish completely qualified diversified trusts to bring the executive branch in line with the judicial and legislative branches who have no right to have them, only the right to have qualified blind trusts.

(b) "Old family trusts" should be able to be blinded under the Act. The following problem has occurred so frequently that OGE has given it the shorthand label of the "old family trust" problem. An "old family trust" is a trust established by an ancestor for the benefit of his or her descendants, including a government official, prior to the effective date of the Act (October 26, 1978) and which has holdings of which the official is aware. In brief, the problem that arises with these "old family trusts" is that the great bulk of them cannot be blinded under the Act, even though the government official beneficiary has no control over the investments of the trust and only the vaguest notion of what the trust holds. This anomalous result comes about because the Act simply did not deal with the "old family trust" situation and because section 202 (f)(7) of the Act, the grandfather clause for blind trusts, has been interpreted to cover only those pre-Act trusts which were originally established as attempts at blind trust arrangements. In other words, at the present time, a pre-Act "old family trust" instrument which was not a good faith effort to establish blindness when originally drafted cannot be later blinded by amendments to the trust instrument. Compare section 202 (f)(7)(A) with section 202 (f)(7)(B) of the Act. OGE believes strongly that this situation should be corrected and the Act amended to allow the interested parties to an "old family trust" to agree (if they can) to blind the trust as to the government official beneficiary. Otherwise, the beneficiaries of the "old family trust" who are not in the government suffer because their trust holdings must be made public in the government official's financial disclosure report and the official himself is forced to know the trust assets for reporting purposes and is thereby hampered in what official actions he may take under principles of 18 USC § 208 (a) (the criminal conflict of interest provision which prohibits a governmental official from taking certain official actions which affect his private financial interests.).

(c) The concept of what is an "excepted trust" should be clarified. The Act sanctions a closely related concept to the "blind" trust (the qualified diversified trust found in Section 202 (f) (4)(B) and the qualified blind trust found in section 202 (f)(3) discussed above) known as the "excepted trust." An "excepted trust" is defined by the Act as one where the government official, his spouse or any dependent child did not create the trust and possess "no knowledge of" its holdings or sources of income. Section 202 (f)(2)(B) of the Act. The benefits of having an "excepted trust" under the Act are threefold: (1) The government official need not worry about taking official actions which might affect such a trust since he could not be in violation of 18 USC § 208 with no knowledge of what the trust actually held; (2) The government official need not report the trust's assets on his public disclosure report (to make him do so would require him to obtain the knowledge he seeks to avoid); and (3) unlike the two types of blind trusts described above, the "excepted trust" requires no official certification from OGE or any other agency. Not surprisingly OGE has dealt with many difficult cases involving government officials who claimed that trusts of which they were beneficiaries fell under this "excepted" category. OGE has been forced in these cases to decide such philosophical conundrums as when does a little knowledge destroy "no knowledge" or how long must "no knowledge" exist before it becomes acceptable "no knowledge" under the Act? Because the Act itself and the legislative history give no answers to these questions, OGE had no guidelines to decide such specific questions as whether the beneficiary of a trust who knew (1) that the trust possessed 3 domestic oil stocks but did not know which ones or (2) in detail what the trust owned three years ago but does not know now qualifies for "excepted trust" treatment. Rather than belabor the point, OGE recommends that this wide-open category of "excepted trusts" be clarified so that further statutory guidance is given as to what constitutes "no knowledge" (e.g., no knowledge for at least five years and knowledge only attaches when a specific holding is known.). ✓

5. Amend the Act to confirm that the Office of Government Ethics is the successor to the Civil Service Commission in the Executive Order and implementing regulations concerning standards of conduct. OGE recommends that Title IV of the Act be amended to recognize explicitly that it has jurisdiction over those matters that the old Civil Service Commission had under Executive Order 11222 (issued by Lyndon B. Johnson on May 8, 1965 and entitled "Prescribing Standards of Ethical Conduct for Government Officers and Employees") and its implementing regulations under 5 C.F.R. Part 735. This would be an important technical amendment to the Act to confirm what is already the case in practice. The amendment however would clarify that OGE had exclusive jurisdiction over these matters, not the Office of Personnel Management,* the Merit Systems Protection Board or similar off-shoots of the old Commission. Time consuming disputes and litigation over this "turf" issue would thereby be avoided.

6. Clarify Title V - 207(g) by removing it from the post-employment conflict of interest laws and define the term "partner". Title V of the Act is entitled "Post-Employment Conflict of Interest" and revises the so-called revolving door rules found in Section 207 of title 18, United States Code. Hidden in the middle of these revisions is 18 U.S.C. § 207 (g) which has nothing to do with post-employment restrictions of former government employees but rather with certain restrictions on partners of present day government employees in appearing before the government. This is a little known, little observed criminal statute whose very misplacement is responsible for the unwitting violations of its provisions. OGE recommends that it be taken out of the post employment

*If this amendment was adopted, OGE would still have its regulations issued by the Office of Personnel Management as presently mandated in Section 402 (6) and 402 (15) of the Act.

conflict of law area and placed either by itself or in another section such as 18 U.S.C. § 208 which is a conflict law affecting current government officials. At the same time, the reach of 207 (g) should be explicitly limited to affect only general partners of government employees. At the present time, the statutory term "partners" in 207 (g) is unrestricted and therefore OGE has been forced to rule that certain limited partners of the government official through various tax shelter investments may be a "partner" for purposes of 207 (g). Once again the legislative history is silent on this subject and OGE believes that the Congress simply was unaware of this issue when 207 (g) was originally passed in 1962. Congress should now take another look at this area to avoid 207 (g)'s reach into unintended and accidental consequences.

7. Abolish designated "senior employees" and separate non-statutory components of agencies for purposes of the One Year Cooling-Off period. The one year "cooling off" period after government employment as set forth in Title V of the Act, at Title 18 U.S.C. § 207 (c), as amended, only applies to certain high level officials. While this part of the revolving door rules was entirely new with the Act, OGE has found that the restrictions themselves have not caused nearly as many problems as have the questions of whom they apply to (ie who should be the "senior employees") and how within an agency should they attach (ie - are there components within an agency that should be separated out from the parent agency to limit the effect of the 207 (c) bar.) Section 207 (d)(1)(C), as amended in 1979, was one of the chief vehicles in the Act which was installed to permit OGE discretion in answering those two questions. OGE's experience over the last three years is that 207 (c) should continue to apply to "senior employees" as defined in (d)(1)(A) (Executive Level Personnel) and in (d)(1)(B) (military officers at pay grade of 0-9 or above) and to persons occupying other positions of comparable level but not to any person below that as permitted by (d)(1)(C). In short, OGE recommends that (d)(1)(C) be abolished because: (1) "Senior employees" such as members of the Senior Executive Service that may be designated in (d)(1)(C) are not normally high enough in the hierarchy to have the influence taint that is attributed to them through 207 (c); (2) OGE has found it too difficult to administer as have the agencies in recommending annual candidates for designation. Due to constant reorganizations, changes of administrations, changes of personnel through RIFs, etc., it is difficult enough for OGE to receive a decent, updated position description of the would-be designee let alone a chain of command chart about where he or she fits in the particular organization. (3) Similarly, the separate non-statutory process is too cumbersome, too difficult to decipher and too subjective to be well administered by OGE. One example will suffice. The Director of OGE has the discretionary power under (d)(1)(C) to ". . . limit the restrictions of subsection (c) [207 (c)] to permit a former officer or employee, who served in a separate agency or bureau within a department or agency, to make appearances before or communications to persons in an unrelated agency or bureau, within the same department or agency, having separate and distinct subject matter jurisdiction, . . ." (Emphasis added.) Some agencies have used that language to argue that their General Counsel's Offices are unrelated to their various program offices where other agencies have refused to even request OGE to consider that determination. (The latter agencies, of course, believe that by definition their General Counsels must be involved in seeing that the agencies programs are being run legally.) Because non-statutory bureaus or offices are most subject to internal administrative and subject matter reorganizations, OGE finds it difficult to rule consistently on situations that are only ephemeral. (4) Finally, the Act itself gives too few meaningful standards for OGE to use in designating (d)(1)(C) senior employees and separate non-statutory components. At the very least, this results in the evil of lack of consistency in designations from agency to agency. For the small number of persons affected and the large amount of paperwork and confusion generated, all concerned would be better off if 207 (c) applied only to those automatically enumerated in 207 (d)(1)(A), (d)(1)(B) and others at comparable levels and that the discretionary decisions required in (d)(1)(C) be abandoned as unworkable under the circumstances.

IDEAS & TRENDS BUSINESS WEEK: April 19, 1982 By E. Pendleton James

Lifting barriers to government service

How can you eliminate waste and mismanagement in government when the laws discourage some of the nation's best managers from coming into government? The chief obstacle at present is the Ethics in Government Act of 1978-79. There is a growing consensus among Democrats and Republicans that this act is defective and that there is an urgent need to modify it, if we value competence together with ethics in government.

Studies indicate that the average tenure in government of a Presidential appointee is about 20 months. Therefore, recruiting is an ongoing activity rather than a one-time endeavor. Moreover, a disappointing number of outstanding candidates for high government positions decline to serve. Facing the reasons for these turndowns and doing something about them is urgently needed.

I will focus on business rather than on other institutional sources of managerial talent because legal and other regulatory constraints tend to bear more heavily on businessmen. In my experience, a business executive tends to explain his or her decision not to serve in such terms as the following: The financial sacrifice is too great, life in a fishbowl is unattractive, moving to Washington is expensive and disruptive to family life, one's corporate career may be jeopardized, the needs for financial disclosure are too onerous.

Many of the best people overcome these objections. Still, the talent pool could be considerably enlarged if at least some of the major hurdles to public office could be removed or lowered.

The central ethical issue is for those charged with public responsibility to avoid conflict of interest. The imperative is integrity and the subordination of personal gain. In those terms the present Ethics in Government Act is an aberration. It grew out of the so-called crisis of public confidence in government following Vietnam and Watergate. The law, hastily put together and enacted, is a study in overkill.

Consider three of its chief elements: financial disclosure, divestiture, and the restrictions on employment after leaving government service.

FINANCIAL DISCLOSURE. Federal Form SF-278, Executive Personnel Financial Disclosure Report, is a daunting document. It could be simplified and still achieve its objective of guarding against conflict of interest. For instance, it requires nominees to specify six categories of value of holdings. Why does it have to be that specific? The legitimate purpose of financial disclosure is not to identify and publicize a nominee's net worth but rather to specify holdings that might be potential sources of conflict. In that way the public interest could be served without pandering to idle curiosity or subjecting nominees to needless inconveniences or even dangers.

Requirements for reporting on trusts or other financial arrangements that involve third parties also tend to be excessive. Not only must the nominee's finances be disclosed but also those of his or her family and associates. Again, such requirements could be modified without jeopardizing the public trust.

DIVESTITURES. The act also requires nominees to dispose of property that represents, or could represent, a conflict of interest. Such disposition may be unavoidable, but some provision could be made to lighten the resulting tax burden. Instead of forcing the outright sale of a property that might result in a large capital-gains tax liability, a revised law could provide for a tax-free transfer of the property in question into neutral holdings.

In other cases, divestiture requirements approach the point of absurdity. The husband of one potential appointee had a small interest in a trust that included holdings that might involve a conflict of interest. Neither the candidate nor her husband had any control over those holdings. Still, the candidate was obliged to withdraw. In such cases, technical changes in the law or more flexible use of waivers would lower the obstacles to public service without endangering the public interest.

EMPLOYMENT RESTRICTIONS. Similarly, the post-government-service requirements set out in the present law could be less constraining. Their ostensible purpose is to prevent former government employees from using in their own interest the special knowledge and contacts they acquired while in office. As it is written and interpreted, however, the law is far more restrictive than it needs to be. In at least one case, for example, a judicial decision barred an entire law firm from serving a certain client because one of the firm's partners had served in government.

Post-government-service prohibitions are supposed to be responsive—at least in contemporary terms—to the "revolving door" concern. In its pejorative use, this term suggests that regulatory agencies may be captured by those whom the agencies are supposed to regulate. However, an equally strong case has been made that the "revolving door" is a good thing, that the national economy benefits when government officials and business executives understand from personal experience each other's legitimate goals. To that extent, the adversary relationship between business and government gives way to one of cooperation.

My purpose in raising these issues clearly is not to discourage government service, it is to urge a detailed review of, and appropriate amendments to, the Ethics in Government Act and related regulations and practices. Government cannot offer its managers the financial rewards of the private sector, nor can it promise officials much privacy. But the laws, at least, ought not punish those who, with the best motives, are eager for public service. The public deserves to be served by the nation's best talent, and when the law deflects that talent, it is clearly not serving the public interest. ■

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United States Senate

COMMITTEE ON
GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT
WASHINGTON, D.C. 20510

February 15, 1983

The Honorable Donald J. Devine
Director
Office of Personnel Management
1900 E Street, N.W.
Washington, D.C. 20415

Dear Mr. Devine:

The Subcommittee on Oversight of Government Management is considering S.461, a bill to reauthorize the Office of Government Ethics for five years beyond its expiration date of September 30, 1983. In addition to addressing the performance of the OGE to date, the Subcommittee is reviewing proposals to amend Titles II, IV, and V of the Ethics in Government Act of 1978. A copy of S.461 is enclosed.

Accordingly, I request that you or the appropriate official provide me with responses to the following questions:

(1) What is the operational relationship between the OGE and the OPM?

(2) Should the Director of the OGE be given statutory authority to issue regulations in his or her own name?

(3) Should the organizational structure of the OGE be changed upon reauthorization? Specifically, should the OGE

(a) be reauthorized as an independent agency?

(b) be reauthorized outside the OPM, yet continue to receive support services from the OPM?

(4) Should the Director of the OGE be authorized to submit budget and staff requests for the OGE directly to the Office of Management and Budget?

(5) (a) Has the OGE been considered a separate agency for purposes of

(i) hiring?

(ii) personnel freeze directives?

(iii) reductions in force?

(b) Does the OPM recommend that the OGE be considered a separate entity for any of the purposes listed above?

Also, I invite you to provide the Subcommittee with any additional comments or recommendations you may have concerning the reauthorization of the OGE. I would appreciate this response by March 1. Please have the response mailed to the Subcommittee on Oversight of Government Management, Committee on Governmental Affairs, 3306 Dirksen Senate Office Building, Washington, D.C., 20510, or have it delivered to the Subcommittee's office at 506 Carroll Arms, 301 1st Street, N.E. If you have any questions, please have your staff contact Mary Gerwin or Susan Collins of the Subcommittee staff at 224-5538.

I thank you for your assistance in the Subcommittee's examination of the Office of Government Ethics.

With best wishes, I am

Sincerely,

William S. Cohen
Chairman

WSC:mbg

Enclosure

United States of America
Office of Personnel Management

Office of the General Counsel
Washington, D.C. 20415

In Reply Refer To:

Your Reference:

MAR 8 1983

The Honorable William S. Cohen
Chairman
Subcommittee on Oversight
of Government Management
Committee on Government Affairs
United States Senate
Washington, D.C. 20510

Dear Senator Cohen:

You have asked this agency to answer the following questions about the relationship between the Office of Personnel Management (OPM) and the Office of Government Ethics (OGE).

(1) What is the operational relationship between the OGE and the OPM?

Answer: Under the Ethics in Government Act of 1978, Public Law 95-521, 92 Stat. 1862 (1978), OGE was established as an office within OPM. Among other things, OGE "under the general supervision of the Office of Personnel Management" was to provide overall direction of Executive Branch policies on preventing conflicts of interest. Generally, OGE was directed to develop rules and regulations to be issued or promulgated by OPM or the President on financial reporting, conflicts of interest, and ethical problems. In response to this charter, OGE has proposed regulations from time to time that are reviewed within OPM and issued as OPM regulations. Both OGE and the Office of the Inspector General at OPM, in recognition of their quasi-independent status and to facilitate administrative support, have been placed under the general supervision of the Deputy Director of OPM.

In discharging its functions, OGE and various OPM program offices, most notably, the Office of the General Counsel, consult and exchange views on ethical problems that implicate personnel management matters. For example, the predicate for ethical conduct of employees in the Executive Branch is based in part on Executive Order 11222 of May 8, 1965. The Government-wide regulations implementing that Executive order are found at title 5, Code of Federal Regulations, at Part 735. Those regulations, however, are not directed only to preventing conflicts of interest and other matters that can neatly be categorized under the rubric of ethics. Rather, the regulations cover a wide variety of proscriptions on employee conduct concerning use of

Government property, financial responsibility, outside employment, gambling, and other conduct "prejudicial to the Government." The interpretation and application of these regulations require coordination between OGE and other offices of OPM.

In a similar vein, 5 U.S.C. § 4111, administered by OPM, permits payment of travel, subsistence, and other expenses by certain organizations incident to training in a non-Government facility or attendance at a meeting. Inevitably, questions are posed to OGE, as part of its Government-wide coordination of the ethics program, about the propriety of accepting such payments for travel. Advice on these and other matters within OPM's personnel management responsibility requires coordination between OGE and the appropriate OPM program office.

OPM also administers 5 U.S.C. § 3109 pertaining to the employment of experts and consultants. The application of standards under the Ethics in Government Act, provisions of Title 18, United States Code, and Executive Order 11222 to "special Government employees" as defined by 18 U.S.C. § 202, is integrally related to the status of persons employed under Section 3109.

The foregoing examples are merely illustrative of the interrelationship between ethical conduct problems and personnel management matters. The present structure ensures that the OGE regulations and policy are consistent with related personnel management programs. At the same time, it does not appear that the present organizational structure has derogated from the independence of OGE in discharging its statutory responsibilities.

I am advised that communication and coordination at the staff level between OGE and OPM or problems of common interest is frequent, cordial, and mutually rewarding. Although OGE has office space along with several other OPM program offices in a building at 1717 H Street, N.W. (a few blocks from the main OPM building at 1900 E Street, N.W.), this physical separation from OPM headquarters has not resulted in a significant impediment to communication and coordination of policy or the rendering of administrative support. To the contrary, this physical arrangement reflects the balance that obtains, properly, between OGE's operational independence and its administrative interrelationships with OPM.

(2) Should the Director of OGE be given statutory authority to issue regulations in his or her own name?

Answer: The present procedure of promulgating OGE ethical conduct standards as OPM regulations has the advantage of ensuring consistency with the overall personnel management policies of the Executive Branch. It does not appear that this procedure has affected the independence of OGE or resulted in undue delays in issuing regulations. The present procedure appears to be working well, and under the circumstances, it is OPM's view that it should not be disturbed.

(3) Should the organizational structure of the OGE be changed upon reauthorization? Specifically, should the OGE

(a) be reauthorized as an independent agency?

(b) be reauthorized outside the OPM, yet continue to receive support services from the OPM?

Answer: For the reasons offered in response to question 2, OPM favors the present structure.

(4) Should the Director of OGE be authorized to submit budget and staff requests for the OGE directly to the Office of Management and Budget?

Answer: The present arrangement of considering OGE budget and staff levels as part of OPM's submissions has an obvious advantage for OMB in efficiency since it is not required to deal with two separate requests. If this procedure is viewed as inadequate recognition of the identity and special needs of OGE, OPM would not object to including OGE as a separate line item in OPM's budget.

(5) (a) Has the OGE been considered a separate agency for purposes of

(i) hiring?

(ii) personnel freeze directives?

(iii) reductions in force?

(b) Does the OPM recommend that the OGE be considered a separate entity for any of the purposes listed above?

Answer: As a statutory entity within OPM, OGE has been subject to personnel freeze directives and reductions in force that apply to OPM generally. Although the Director of OGE does not have separate hiring authority, only the filling of two OGE Senior Executive Service positions (those of the Deputy Director and the Chief Counsel) require OPM approval. The Director of OGE has complete discretion to hire the remainder of his staff within the limits of applicable personnel rules and regulations that apply to every agency.

Although there have been numerous reorganizations of OPM under the two Administrations since OGE was established, the effect on the autonomy of that office and its resources has been minimal. During the agency-wide reduction in force of March, 1982, one professional employee (the administrative officer) and three secretaries were affected through displacement by other OPM employees with greater retention rights. However, OGE sustained no net loss of staff, and the incumbent administrative officer later regained his position with OGE.

For the reasons already advanced, we recommend that the present statutory organizational structure of OGE as an office within OPM be retained. The particular needs of OGE concerning budget and staffing levels can, in our judgment, best be handled administratively within OPM.

OGE has discharged its responsibilities under the Ethics in Government Act and related statutes in a professional and responsible manner since the office was established four years ago. We believe the office performs a valuable service, often under difficult and controversial circumstances. We recommend that the authorization of OGE as part of this agency be extended, and we look forward to working with OGE staff in what we believe to be a mutually beneficial relationship.

We hope you find these comments responsive to your request.

Sincerely yours,

Joseph A. Morris
General Counsel

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United States Senate

COMMITTEE ON
GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT
WASHINGTON, D.C. 20510

February 9, 1983

The Honorable William French Smith
Attorney General
Department of Justice
Constitution Avenue and Tenth Street, N.W.
Washington, D.C. 20530

Dear Mr. Attorney General:

On February 24, the Subcommittee on Oversight of Government Management will hold a hearing on S.461, a bill to reauthorize the Office of Government Ethics for five years beyond its present expiration date of September 30, 1983. The hearing will evaluate the functions that the OGE has performed to date and proposals to amend Titles II, IV, and V of the Ethics Act. I have attached a copy of S.461.

Although I am not requesting the Department of Justice to testify at the hearing, I ask that you or the appropriate official submit a written statement for inclusion in the Subcommittee's hearing record. It would be useful to the Subcommittee if your statement would address the following issues:

(1) The relationship between the OGE and the Department of Justice in coordinating, improving, and enforcing the conflict of interest and standards of conduct statutes and regulations. Specifically, what is the relationship of the OGE with the Office of Legal Counsel and with the Public Integrity Section?

(2) What changes, if any, should be made to improve the coordination of the OGE and the DOJ in these areas?

(3) What effect have the existence and functions of the OGE had on the ethics in government program?

(4) What recommendations, if any, does the Department of Justice have to amend Titles II, IV, or V of the Ethics in Government Act of 1978?

I request that the statement be submitted to the Subcommittee no later than March 1, so that it can be included in the hearing record. Please have the statement mailed to the Subcommittee on Oversight of Government Management, Committee on Governmental Affairs, 3306 Dirksen Senate Office Building, Washington, D.C. 20510, or delivered to the Subcommittee's office at 506 Carroll Arms, 301 1st Street, N.E. If you have any questions, please have your staff contact Mary Gerwin or Susan Collins of the Subcommittee staff at 224-5538.

I appreciate your assistance in the Subcommittee's examination of the Ethics in Government Act of 1978.

With best wishes, I am

Sincerely,

William S. Cohen
Chairman

WSC:mbg

Attachment

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

APR 8 1983

Honorable William S. Cohen
Chairman
Subcommittee on Oversight
and Government Mananagement
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on §2 of S. 461, a bill "to extend the authorization of appropriations for the Office of Government Ethics for five years." While the Department of Justice supports the extension of the Office of Government Ethics ("OGE"), we strongly oppose §2 of S. 461 as passed by the Senate on April 6, 1983, which would amend §401(b) of the Ethics in Government Act (the "Act") by limiting the right of the President to remove the Director of OGE to "good cause". Additionally, §2 of S. 461 would also amend §401(b) of the Act by establishing a five year term for the Director.

At present, the Director of OGE is an official of the Executive Branch. OGE itself is part of the Office of Personnel Management (OPM), which is within the Executive Branch. See, §401 of the Act. The Director is under the general supervision of OPM, see, §402(a) of the Act, and serves at the pleasure of the President. The President is ultimately responsible for the conduct of the Director and the performance of OGE's obligations. To limit the President's right of removal raises not only constitutional concern but would likely adversely affect the present activities of OGE.

Article II of the Constitution vests the Executive power of the government in the President. He has general responsibility for executing the laws of the United States. Article II, §3 provides that the President "shall take care that the Laws be faithfully executed." The President, therefore, has not only the power, but the constitutional obligation, to execute the laws in a responsible manner. Inherent in this authority, and obligation, is that officials of the Government who exercise, as delegates of the President, fundamental Executive functions, be accountable to the President. To limit the removal authority of the President over such individuals

would make them unaccountable. This is inconsistent with the President's constitutional responsibility for the Executive functions performed by such officials. See Parsons v. United States, 167 U.S. 324 (1897), Myers v. United States, 272 U.S. 52 (1926), and Martin v. Reagan, 525 F.Supp. 110 (D. Mass. 1981).

The full range of OGE's responsibilities, as set forth in §402 (b) of the Act, include several classic executive functions, requiring the exercise of considerable executive discretion. For example, OGE has responsibility to interpret the criminal conflict of interest laws. See §408(b)(8). It monitors and investigates compliance with the public financial disclosure requirements of the Act. See §408 (b)(3). It reviews individual financial statements to determine whether a conflict of interest is present and makes recommendations to correct any deficiencies determined to exist. See §408(b)(4). We believe that these and the other statutory functions of the Director must remain subject to the supervisory control of the President.

Moreover, to limit the President's removal authority over the Director of OGE would alter the role of OGE in a manner that would undermine OGE's ability to carry out its existing responsibilities. Specifically, at the present time, OGE and this Department have a written agreement governing OGE's interpretation of the criminal conflict of interest statutes, and the Department's prosecutorial policy in matters with respect to which OGE has previously rendered advice. The exercise of prosecutorial discretion is a fundamental Executive function. It is questionable whether this Department would enter or continue such an agreement with any official who was not clearly within the Executive Branch and subject to the direction and control of the President. Without the assurance of a complementary prosecutorial policy, the opinions of OGE would be of little value to employees seeking definitive advice on conflict of interest matters. This is but one example, albeit significant, which indicates that the role of OGE would change dramatically if a limitation on the President's removal authority were to be enacted.

For the foregoing reasons, the Department of Justice strongly opposes section 2 of S. 461 as passed by the Senate. We are aware of no reason for OGE to be more "independent" from the Executive Branch. The Department of Justice opposes any attempt to insulate the Director of OGE from the ordinary removal authority of the President.

We have submitted a similar letter to Chairman Roth, as well as to the appropriate Committees of the House of Represemtatives.

The Department is continuing to review both S. 461 and the Ethics in Government Act and hopes to communicate further with the Committee.

The Office of Management and Budget has advised this Department that the enactment of §2 of S. 461 would not be consistent with the Administration's objectives.

Sincerely,

Robert A. McConnell

ROBERT A. McCONNELL
Assistant Attorney General

MEMORANDUM OF AGREEMENT

This memorandum records the following agreement between the Department of Justice (DOJ) and the Office of Government Ethics (OGE) relating to the responsibility of rendering formal advisory opinions with which the Director, OGE, is charged by section 402(b)(8) of the Ethics in Government Act of 1978, P.L. 95-521, as amended (the Act).

FIRST: That the functions of the Director, OGE, under §402(b)(8) of the Act include the rendering of formal written advisory opinions on matters of general applicability and important matters of first impression which involve the interpretation or application of any of the laws embodied in 18 U.S.C. 202-209 (conflict of interest laws).

SECOND: That the Director, OGE, shall consult with the Criminal Division, DOJ, before rendering an advisory opinion on an actual or apparent violation of any conflict of interest law. If after consultation the Criminal Division determines to undertake a criminal investigation, the Director shall not render an advisory opinion pending a determination by the Criminal Division not to prosecute.

THIRD: That if the Director, OGE, proposes to render an advisory opinion involving any conflict of interest law that in his judgment is an opinion on an important matter of first impression and if there has been no actual or apparent violation of such law in the matter, he shall consult with the Office of Legal Counsel, DOJ, before issuing the opinion.

FOURTH: That (a) any person who relies upon any provision or finding of an advisory opinion in accordance with subparagraph (b) and who acts in good faith in accordance with the provisions and findings of such opinion shall not, as a result of such act, be subject to prosecution under any conflict of interest law, and

(b) any advisory opinion rendered by the Director, OGE, under paragraph FIRST may be relied upon by (1) any person involved in the specific transaction or activity with respect to which such advisory opinion has been rendered and (2) any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion has been rendered.

This agreement shall be effective May 19, 1980.

Department of Justice

by John M. Harmon

title Asst. Atty. Gen.-OLC

date May 7, 1980

by Philip B. Heymann

title A Dep Criminal Div.

date May 17, 1980

Office of Government Ethics

by J. Jackson Walter

title Director

date April 24, 1980

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United States Senate

COMMITTEE ON
GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT
WASHINGTON, D.C. 20510

February 9, 1983

Roswell B. Perkins, Esq.
Debevoise and Plimpton
299 Park Avenue
New York, New York 10171

Dear Mr. Perkins:

On February 24, the Subcommittee on Oversight of Government Management will hold a hearing on S.461, a bill to reauthorize the Office of Government Ethics for five years beyond its expiration date of September 30, 1983. The hearing will evaluate the functions that the OGE has performed to date, as well as consider some changes in Titles II, IV, and V of the Ethics in Government Act of 1978. I have enclosed a copy of S.461.

In light of your extensive background and expertise, I would be very pleased if you would submit a written statement on your views concerning the need to reauthorize the OGE. Time constraints preclude me from inviting you to appear before the Subcommittee; however, your statement will be distributed to all the Senators who serve on the Subcommittee and will be included in the printed hearing record. It would be particularly useful to the Subcommittee if your statement would address the following issues:

(1) the major functions that the OGE has performed in the past five years;

(2) how the OGE has improved the ethics in government program;

(3) any changes that you may have to restructure the OGE upon reauthorization;

18-299 O - 83 - 12

(4) any proposals you may have to amend Titles II, IV, or V of the Ethics Act;

(5) your views on the effect of the Ethics Act on presidential recruiting efforts.

If you wish to submit a written statement, it should be sent to the Subcommittee prior to March 1. Please mail your statement to the Subcommittee on Oversight of Government Management, Committee on Governmental Affairs, 3306 Dirksen Senate Office Building, Washington, D.C. 20510.

I appreciate any assistance that you could give the Subcommittee in its examination of the OGE. If you have any questions, please call Mary Gerwin or Susan Collins of the Subcommittee staff at (202) 224-5538.

With best wishes, I am

Sincerely,

William S. Cohen
Chairman

WSC:mbg

Enclosure

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MICHAEL E PATTERSON
DOMINIQUE BLANCO

MAR 9 '83

March 4, 1983

Sen. William S. Cohen
Chairman, Subcommittee on Oversight
of Government Management
Committee on Governmental Affairs
U.S. Senate
Washington, D.C. 20510

S. 461

Dear Mr. Chairman:

Thank you for your invitation to submit a statement in connection with the above-mentioned bill, which would reauthorize the Office of Government Ethics for five years beyond its expiration date of September 30, 1983.

I have been involved with studies of the Federal conflict-of-interest laws since 1958 and have written and spoken on this topic. I was Chairman of the Special Committee of the Association of the Bar of the City of New York which wrote an extensive report in 1960* making recommendations with respect to amendment of the Federal conflict-of-interest laws. One of our most important recommendations was the creation of an office comparable to the present Office of Government Ethics. It took 18 years before our recommendation was adopted by Congress, in the Ethics in Government Act of 1978.

---

* Conflict of Interest and Federal Service (Harvard University Press, 1960).

The Office of Government Ethics ("OGE") has, in my view, been an unqualified success. I strongly recommend enactment of S. 461. Indeed, I would favor an authorization for indefinite existence.

There are five key elements in the functions of OGE, as I see it.

First is the preparation of regulations. Whenever a statute is enacted which deals with a complex subject and which introduces new concepts and procedures, almost inevitably regulations will be needed which more fully define statutory terms which amplify the statutory provisions and which provide, if necessary, the mechanics of implementation.

The 1978 Act properly placed in OGE the responsibility for developing and recommending to the Office of Personnel Management rules and regulations pertaining to conflicts of interest and ethics in the Executive Branch. This responsibility, I should point out, is by no means limited to the substantive areas covered by the '78 Act; the regulatory initiative applies to the entire field of conflicts of interest and ethics within the Executive Branch. The OGE regulations are not additive mandates expanding the area of Federal Government action, but, rather, are clarifying and interpretive regulations which are intended to and do make compliance easier and more certain, rather than the reverse.

The second area which the Office of Government Ethics has been mandated to pursue is that of enforcement. Obviously, criminal statutes, such as the basic conflict of interest laws, must ultimately be enforced by the Justice Department. However, OGE must play a major role in enforcement. The Act requires OGE to "monitor Executive Branch enforcement of all laws relating to conflict of interest". It requires specifically that the Director monitor and investigate compliance by Executive Branch officials with the public financial disclosure requirements. It requires the Director to oversee the "manner in which agency officials are performing their responsibilities to receive and review financial disclosure reports and make such reports available to the public." OGE

must establish the entire system for review of these reports, and has been given the authority to order corrective action. OGE is required by the Act to cooperate with the Attorney General in developing an effective system for reporting allegations of violations of conflict of interest laws to the Attorney General.

This panoply of responsibilities is expanded by the grant of certain authority to initiate civil penalties in individual cases, which is a very important subject. In performing his responsibilities to recommend regulations pertaining to the identification and resolution of conflicts of interest, the Director of OGE must develop procedures whereby the inadvertent or technical mistake made by an individual can be resolved through a civil action. This is a major innovative step.

Preventive measures are the third broad area of responsibility of OGE. The preventive aspects of providing information concerning the statutes and regulations, such as providing breifing materials for new Government employees, are exceedingly important. As the Senate Report states:

> "It is anticipated under this section that the Director will conduct an ongoing program to inform Executive Branch employees of the requirements of the law and of regulations governing their conduct and establish procedures to promptly notify employees of any changes in such laws and regulations."

The major expansion of the educational process which has occurred in recent years is largely the result of the work of OGE, and OGE has had a major impact on improving the understanding and the awareness of problems of ethics in Government.

The fourth broad area of OGE's responsibilities is that of interpretive advice and advisory opinions. Going back again to 1960, we emphasized that the conscientious employee deserves a reliable prior answer to the question of whether his own circumstances will violate the conflict

of interest statutes and regulations. The 1978 Act achieves this step forward by mandating the Director to establish a formal advisory service for rendering opinions. This is in addition to the Director's responsibility to assist the agency ethics counselors and to give informal advice and advisory opinions.

One sentence in the statute is of great importance, namely, the requirement that the advisory opinions be compiled, published, and made available to agency ethics counselors and the public.

The fifth broad area of OGE's functions is that of evaluation. Obviously, a field such as conflict of interest regulation is one that evolves and changes as Governmental functions and procedures change and as experience in applying the statutes and regulations is acquired. Accordingly, it is eminently sound that among the functions of OGE prescribed by the '78 Act is that of assisting the Attorney General in evaluating the effectiveness of the conflict of interest laws and of recommending necessary legislative action.

These, then, are the critical functions which make the Office so important.

A word about the costs of OGE. They are, in my view, nominal in relation to the benefits achieved by OGE. If there were no OGE, the duplication of effort involved in trying to reconstruct precedents and in trying to find answers in the absence of continuous contact with the field would be far greater than the cost of OGE. The cost of one special investigation involving events which could have been avoided by having an OGE might well exceed the budget of the Office of Government Ethics. The cost of the wasteful duplicative work which would have to be performed in each of the departments and agencies would surely far exceed the costs of OGE.

In addition to observing the operation of OGE from an "academic" viewpoint, I have had numerous contacts with OGE in my capacity as an attorney in private practice representing clients. I can attest to the effectiveness of OGE in assisting persons entering or leaving Government service to achieve

compliance with conflict-of-interest laws and regulations. The service has been efficient, prompt, knowledgeable and courteous. I know of no unit of Government which has performed its assigned role with greater benefit to the public.

I am limiting the subject matter of this letter to the question of extending the life of OGE, although I hope to have time to submit comments on substantive provisions of the statutes.

Sincerely yours,

Roswell B. Perkins

DIGEST OF SELECTED OGE LETTERS

1982

OFFICE OF GOVERNMENT ETHICS

January 1983

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1982

82 X 1
01/11/82

OGE advised an IRS official that the submission of a letter to the IRS by a former employee on behalf of a client which simply agrees to an assessment and points out that a check has been tendered is not a communication submitted with the "intent to influence" and is not therefore prohibited by 18 U.S.C. 207(a) even though the former employee had been responsible for recommending the assessment while employed by the IRS. OGE did warn, however, that such determinations are always very close and the tenor of any such communications must be carefully reviewed to ensure that no prohibited representation was involved.

82 X 2
01/18/82

OGE advised a former government employee who served in the executive branch until 1967 and in the legislative branch from 1976-1980 that he was subject to the post employment restrictions of 18 U.S.C. 207(a) as it read in 1967 and not as it presently reads, having been amended in 1978 and 1979. The former employee had asked if he would be prohibited from acting as a consultant to a subcontractor in its suit against a prime contractor arising out of the prime contractor's fulfilling the terms of a contract with the individual's former agency in which he had personally and substantially participated as an employee. He was directed to contact his former agency to determine if it had an interest in the litigation before proceeding.

82 X 3
01/26/82

OGE advised a DAEO that it was the intent of OGE through its regulations in Part 738 of Title 5 CFR, that each agency have only one designated agency ethics official and only one alternate agency ethics official for purposes of the duties referred to in section 738.203(b)(3). An agency could have any number of deputy ethics officials and one of those could also serve as the alternate. Only the designated agency ethics official is required by virtue of that position to file a public financial disclosure report.

82 X 4
03/10/82

OGE advised an attorney representing a government machinist that an agency could, under its regulatory equivalent to 5 CFR 735.203, prohibit the outside employment of the employee in a private machine shop doing business with that agency even though the machinist through his government position could not affect the contract decisions of his

agency and would not in his private job perform work required under any contract with his agency. The agency had a long-standing policy of prohibiting such work and had based its policy on the fact that the degree of appearance of impropriety of such arrangements had in the past subjected the agency to unfavorable criticism and impaired the public's confidence in the agency. OGE noted that unless an agency's judgment in this area was arbitrary or capricious, we would not overturn it.

82 X 5
04/05/82

OGE advised a private attorney that a former government employee who testified on behalf of a private party in a rate making proceeding would violate 18 U.S.C. 207(a) if the proceeding were considered to be the "same particular matter involving a specific party or parties" as an earlier rate making proceeding in which he had personally and substantially participated. OGE had been told that the first proceeding involved a large number of movements of one commodity, the sole party in the second proceeding was one of a number of parties in the first, the second proceeding challenged the rates established in the first, and the commodity and the shipping points for the individual party in the second proceeding were the same as they were for that party in the first proceeding. OGE stated that from the facts presented, there was a distinct possibility the two proceedings might have to be viewed as the same particular matter but because the private attorney had not provided enough specific facts and because we had not contacted the agency, we suggested the matter be brought to the attention of the agency so that it might provide a more thorough review before accepting the testimony of the former employee.

82 X 6
05/17/82

OGE advised a government official that any portion of an executor's fee and a trustee's fee "brought about" by services performed in such capacities while also serving in the Government, must be considered as outside earned income for the limitations set forth in Section 210 of the Ethics in Government Act (5 U.S.C. App. § 210). In the case of the executor's fee which is one amount set by state law as a percentage of the corpus, the amount attributable each year to the outside earned income limitation ceiling of the government official would be the total amount of the fee divided by the number of total hours in which services were performed to complete the duties, times the number of hours of services actually performed by the official during the year in question. For the trustee's fee which is set by state law each year as a percentage of the corpus, the amount of outside earned income for any one year or portion of a year would be the total amount of the fee divided by 365 days times the number of days the individual served both as trustee and government official.

82 X 7
04/19/82

OGE advised a former senior employee that 18 U.S.C. 207(b)(i) and (c) would not prohibit him from being present in the courtroom or even advising defense counsel at defense counsel's table during the proceedings involving a particular matter in which he had not personally participated but which had been under his official responsibility during his last year of government service. Section 207(b)(ii) was not at issue because of the senior employee's lack of personal and substantial participation in the matter while in government. The former senior employee could not with the intent to influence engage in any oral and/or written communications with any government attorneys or witnesses in the matter. (He was counseled that he could not act as the de facto defense attorney in the matter and merely use the de jure defense attorney as a straw representative.)

82 X 8
06/02/82

OGE advised a DAEO that if an employee of his Department were to accept a transfer to the World Bank, she could act on behalf of the Bank on any matter pursuant to the exceptions to 18 U.S.C. 207 found in 5 CFR 737.23(b)(2). The exception runs to employees of a public international organization on assignment from an agency. The letter discusses the other personnel statutes leading to the conclusion that a transfer in this case is the equivalent of a temporary assignment.

82 X 9
06/11/82

OGE advised an agency ethics officer that an honorarium paid to a charitable organization on a government employee's behalf must be counted as outside earned income to the employee for purposes of Section 210 of the Ethics in Government Act (5 U.S.C. App § 210).

82 X 10
06/22/82

OGE advised a government official that employees of the Government Printing Office are not subject to the restrictions of 18 U.S.C. 207. Section 207 applies only to employees of entities within the executive branch as those terms are defined by 18 U.S.C. 6 and 5 CFR 737.3(a)(2) for purposes of that section. The GPO does not fall within that definition and indeed has long been recognized as part of the legislative branch.

82 X 11
06/30/82

OGE advised a government official that a former employee, in order to take advantage of the exception to 18 U.S.C. 207 for representing Indian tribes, must notify the governmental body before which he wished to appear that the matter involved in the appearance was one in which he personally and substantially participated as a government employee. The former employee would not fulfill the requirements of 25 U.S.C. 450i(f) if he simply made a disclosure of the government position he had held and the general matters under the official responsibility of an incumbent in that position.

82 X 12
08/05/82

OGE advised a private organization that Title II of the Ethics in Government Act did not require a retired military officer who is now employed in the executive branch to disclose his military retirement income. Such retirement income is considered "reduced compensation for reduced current services" and therefore falls within the parenthetical exception in Section 202(a)(1)(A) of the Act (5 U.S.C. App. §202(a)(1)(A)). That language excepts from disclosure income from "current employment by the United States Government."

82 X 13
08/13/82

OGE advised a state official that a former Federal attorney would be barred by 18 U.S.C. 207(a) from representing that State to or before any Federal agency or employee in the State's prosecution of an individual for securities fraud when the former attorney had participated personally and substantially in the Federal Government's prosecution of the same individual for the same activities. The State's prosecution was deemed part of the same particular matter as the Federal prosecution inasmuch as it involved the same basic facts, related issues, the same defendant and the same confidential information. Further, the Federal Government had an interest in the State court prosecution because a receiver had been appointed in the Federal case, he had not completed his duties, and the Federal Government had an interest in preventing inconsistent results.

82 X 14
10/21/82

OGE advised a private attorney setting up a qualified blind trust for a government official that Section 202(f)(3)(c)(ii) of the Ethics in Government Act would prohibit a trustee from holding in trust for any interested party any asset which the interested party is specifically prohibited by law or regulations from holding. This is so even though the interested party would be unaware of the asset acquired by the trustee. OGE's position is based on the legislative history of the provision which was outlined in the letter.

82 X 15
11/01/82

OGE advised a private corporation that it might, without violating 18 U.S.C. 209, pay certain expenses incident to one of its employee's move to the Washington area in part in order to participate in the one-year President's Executive Exchange Program. Payments which might not be acceptable under the specific exception provided in 18 U.S.C. 209(e) for these programs, but which were allowed in this specific case because of other attendant facts, included a moving allowance based on a percentage of the employee's salary (with adjustments for family size) and a mortgage interest differential allowance. OGE determined that the move was in this case an intra-company move rather than a move simply to participate in the Executive Exchange Program. The payments made by the corporation were made pursuant to a bona fide employee benefit plan.

82 X 16
11/05/82

OGE advised a former government attorney that he was prohibited by 18 U.S.C. 207(a) from representing his law firm in its negotiations with an agency concerning the agency's wish to hire the firm to serve as its outside counsel in one aspect of a matter in which the former attorney had personally and substantially participated. Once the firm was hired, the former attorney could provide legal services under the contract as a representative of the Federal Government.

82 X 17
11/18/82

OGE advised a publishing company that it would not be prohibited by the gifts restrictions of 5 CFR 735.202 from distributing free of charge a special edition of a reference book to the 29,000 officials listed in the book. While the company did business or was seeking to do business with many of the agencies in which these officials served, OGE felt that because the book was not sponsored by any one interest group, was neutral in its presentation of textual information, was paid for through the sale of advertising, was mass produced and would be distributed on an unsolicited basis, that it fell with the exception for unsolicited advertising. Further, OGE advised the company that since the fair market value of the book was less that $35, its receipt need not be disclosed on a public financial disclosure report (SF-278) filed by any recipient pursuant to Title II of the Ethics in Government Act.

82 X 18
12/03/82

OGE advised an agency official that outside earned income for purposes of Section 210 of the Ethics in Government Act includes income from the sale or other disposition of, transfer of an interest in, or licensing of the use of an intellectual property such as a manuscript by the offical who created the property. However, royalties from a book,

where all personal services of the author were rendered prior to his or her entry into the Government, do not constitute outside earned income for purposes of Section 210.

82 X 19
12/09/82

OGE advised an agency that although the court in Bachman v. Pertschuk, 437 F. Supp. 973 (D.D.C. 1977), had specifically interpreted the exception in 18 U.S.C. 205 (third paragraph) to mean that only representation in administrative hearings were permitted and not those in any subsequent appeal to a court, this Office supported the positions taken by two Attorneys General in separate reports that the term "personnel administration proceedings" was a broader concept and that Federal attorneys, with the appropriate approvals, should not be prohibited from representing employee/clients in such proceedings in court. For an employee to represent another employee in such a matter, however, his or her supervisor must decide that such representation is "not inconsistent with the faithful performance of his duties". Nothing in the Federal Service Labor Management Relations Statute (5 U.S.C. 7102) would confer any special authority which supercedes this requirement.

82 X 20
12/20/82

OGE advised an employee that he would not be prohibited by 18 U.S.C. 203 and 205 from working for a consulting firm on a contract the firm has with another agency if he did not represent the firm before the agency either orally or in writing and if payment for his services was not contingent on the firm's contract (i.e. he was a salaried or hourly worker for the firm). This advice was premised on the facts that the type of job or the firm itself did not present a conflict with the employee's government position and that he did not use official time, resources or non-public information of his employing agency.

82 X 21
12/28/82

OGE advised a Commission that a former Commissioner would not be prohibited by 18 U.S.C. 207 from being hired by a United States District Court Judge to be his special representative on a matter in which the former Commissioner had participated personally and substantially. His serving as a representative of the Court would fall within the exception for acting on behalf of the United States. (In negotiating with the Court for this position, the former employee represented only himself.) Further, OGE indicated that the contemplated activities of the former Commissioner on behalf of the Court might give him the status of an independent contractor and he would therefore not be prohibited by 18 U.S.C. 203 and 205 from representing private clients before the Government. (The less restrictive provisions for special government employees would not have any bearing in this case as an employee of the judicial branch cannot be a special government employee).

82 X 22
07/09/82

OGE issued to the Heads of Departments and Agencies of the Executive Branch a comprehensive memorandum entitled "Members of Federal Advisory Committees and the Conflict-of-Interest Statutes" for the purpose of identifying the factors relevant to a determination whether or not the members of a given advisory committee are government employees and thus bound by the provisions of 18 U.S.C. 202-209.

The memorandum (1) sketches the background of the conflict-of-interest statutes, including in particular 18 U.S.C. 202(a), which defines the term "special government employee" (SGE), (2) discusses, in the light of the governing regulations, the Federal Personnel Manual, Ch. 735, App. C, the characteristics of advisory committee members who are SGE's, as distinguished from those who are industry, labor, agricultural or other representatives and therefore remain in private roles, and (3) applies the principles enunciated by App. C, supra, to the members of a number of present or former advisory committees by way of illustration.